

No. 12747

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United States  
Court of Appeals  
for the Ninth Circuit.

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J. R. NORBERG, an Individual Doing Business as NORBERG  
ADJUSTMENT BUREAU; HOPE D. PETTEY, WIL-  
LIAM B. DOLPH, ALICE HUSTON LEWIS, HELEN  
S. MARK, ELIZABETH N. BINGHAM, D. NORTH  
CLARK, EDWIN P. FRANKLIN, GLENNA G. DOLPH,  
Individually and Doing Business as Co-partners Under the  
Firm Name and Style of KJBS BROADCASTERS,

Appellants,

vs.

PAUL W. RYAN, Trustee of the Estate of BRICK O'GOLD, a  
Corporation,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

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No. 12747

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorneys for Plaintiff and Appellee.



In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 29769

HARRY F. MEILINK, Trustee of the Estate of  
BRICK O' GOLD, a Corporation,

Plaintiff,

vs.

J. R. NORBERG, an Individual, Doing Business  
as NORBERG ADJUSTMENT BUREAU;  
HOPE D. PETTEY, WILLIAM B. DOLPH,  
ALICE HUSTON LEWIS, HELEN S.  
MARK, ELIZABETH N. BINGHAM, D.  
WORTH CLARK, EDWIN P. FRANKLIN,  
GLENNNA G. DOLPH, Individually and Doing  
Business as Co-partners Under the Firm Name  
and Style of KJBS BROADCASTERS;  
FIRST DOE, SECOND DOE and THIRD  
DOE,

Defendants.

### COMPLAINT TO RECOVER PREFERENCE

Plaintiff complains of the above-named defendants and each of them and for cause of action alleges:

#### I.

Defendants, First Doe, Second Doe and Third Doe, are the fictitious names of defendants whose true names are unknown to plaintiff, and plaintiff asks that when such true names are discovered that this Complaint may be amended by inserting such

true names in the place and stead of such fictitious names.

## II.

This action arises under the Act of Congress relating to Bankruptcy as amended in 1938, U.S.C., Title 11, Section 96(b), as hereinafter more fully appears.

## III.

On November 9, 1949, an involuntary petition in bankruptcy was filed against Brick O' Gold, a corporation, in the Southern Division of the United States District Court for the Northern District of California, and on November 28, 1949, said Brick O' Gold, a corporation, was adjudicated a bankrupt by said Court. Thereafter, and on February 14, 1950, plaintiff was appointed Trustee of the estate and effects of said bankrupt and presented his bond, as required by law, which was approved by said Court and ever since plaintiff has been, and now is, the duly appointed, qualified and acting Trustee of the estate of said bankrupt, all of which appears by the records of the Clerk of the above-entitled Court, in those certain proceedings entitled "In the Matter of Brick O' Gold, a corporation, Bankrupt," and being No. 38320-G, In Bankruptcy, of said records.

## IV.

That within four (4) months next preceding the filing of said involuntary petition in bankruptcy and more particularly on or about September 13, 1949, and in the District aforesaid, and while said Brick O' Gold, a corporation, was then and there insolvent, defendants caused a writ of attachment

on said September 13, 1949, to be levied on property belonging to said Brick O' Gold, a corporation, bankrupt, which said writ of attachment was issued in that certain action entitled "J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, Plaintiff, vs. Brick O' Gold, Inc., a corporation, et al., Defendants," being action No. 258127 of the files and records of the Clerk of the Municipal Court of the City and County of San Francisco, State of California, which said action was filed on or about September 12, 1949, on a claim assigned to said defendant, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, by said defendants, KJBS Broadcasters, a co-partnership; and thereafter said defendants caused a writ of execution to be levied on the property of the bankrupt, as a result of which there came into the possession of said respondents the total sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40); that at the time of the levy of said writs, as aforesaid, said defendants were generally and wholly unsecured creditors of said Brick O' Gold, a corporation, bankrupt, and that in procuring, pursuant to the levy of said writs of attachment and execution, the said amount of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40), it enabled said defendants, as such creditors, to obtain payment of a greater percentage of their said debt than other creditors of bankrupt of the same class.

## V.

That at the time of the levy of the writ of attach-

ment on said September 13, 1949, and the writ of execution on or about October 5, 1949, said defendants and each of them had reasonable cause to believe that the enforcement of said levies of attachment and execution would effect a preference and that defendants and each of them at the time of said levies and at all times thereafter knew and/or had reasonable cause to know that said bankrupt was then and there insolvent.

## VI.

That other of said bankrupt's general and wholly unsecured creditors have duly filed in the bankruptcy proceedings of the said Brick O' Gold, a corporation, bankrupt, duly verified and proper proofs of their respective claims against its said estate, which said claims have been allowed, and that the assets of said bankrupt estate are insufficient to satisfy the claims for said creditors in full.

Wherefore, plaintiff prays judgment against said defendants and each of them for the said sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40) plus legal interest from and after the date of the filing of this action to the date of judgment herein, for costs herein incurred and for such other, further and proper relief as may be meet in the premises.

MAX H. MARGOLIS,

JAMES M. CONNERS,

By /s/ JAMES M. CONNERS,  
Attorneys for Plaintiff.

United States of America,  
Northern District of California,  
City and County of San Francisco—ss.

James M. Conners, being first duly sworn, deposes and says:

That he is one of the attorneys of record for Harry F. Meilink, the Trustee named in the foregoing petition; that he makes this verification for and on behalf of said Harry F. Meilink for the reason that said Harry F. Meilink is temporarily outside of the County wherein affiant maintains his office; that he has read the petition and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein alleged on information or belief, and as to such matters he believes it to be true.

/s/ JAME M. CONNERS.

Subscribed and sworn to before me this 19th day of May, 1950.

[Seal] /s/ C. J. DORAN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

## ANSWER

Comes now defendants above named, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenn G. Dolph, individually and doing business as copartners under the firm name and style of KJBS Broadcasters, and answering plaintiff's complaint on file herein admit, deny, and allege as follows, to wit:

### I.

Answering paragraph IV of said complaint, said defendants deny each and every, all and singular, generally and specifically the allegations therein contained, save and except that said defendants admit that on or about September 12, 1949, an action was filed by defendant herein, J. R. Norberg, in the Municipal Court of the City and County of San Francisco, and being Number 258127, and in said action, a number of Writs of Attachment were levied upon a number of alleged debtors of said purported bankrupt, and thereafter a judgment was obtained against said alleged bankrupt, and thereafter a Writ of Execution was levied upon several alleged debtors of said purported bankrupt, and on or about October 5, 1949, pursuant to said Writ of Execution, defendant J. R. Norberg herein obtained the sum of \$1,076.40.

II.

Answering paragraph V of said complaint, said defendants deny each and every, all and singular, generally and specifically the allegations therein contained, save and except as to the matters herein-after specifically admitted.

III.

Answering paragraph VI of said complaint, said defendants deny each and every, all and singular, generally and specifically the allegations therein contained.

Wherefore, defendants pray that they be hence dismissed with their costs.

/s/ **WILLIAM BERGER,**  
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 9, 1950.

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[Title of District Court and Cause.]

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

The above-entitled action came on regularly for trial before the above-entitled Court on August 1, 1950, Max H. Margolis and James M. Conners appearing by and through Max H. Margolis as attorneys for plaintiff above named, and William Berger appearing as attorney for the defendants above

named, and evidence both oral and documentary having been introduced and the continued trial of said cause having been set over to August 2, 1950, at which time additional evidence both oral and documentary having been introduced, at the conclusion of which the matter having been submitted to the Court for decision, the Court finds the facts and states the conclusions of law as follows:

### Findings of Fact

From the evidence both oral and documentary the Court finds:

1. The action alleged in plaintiff's complaint arises under the Act of Congress relating to Bankruptcy as amended in 1938, U.S.C. Title 11, Section 96b.
2. On November 9, 1949, an involuntary petition in bankruptcy was filed against Brick O' Gold, a corporation, in the Southern Division of the United States District Court for the Northern District of California, and on November 28, 1949, said Brick O' Gold, a corporation, was adjudicated a bankrupt by said Court; and thereafter on February 14, 1950, Harry F. Meilink, plaintiff above named, was appointed Trustee of the estate and effects of said bankrupt corporation and presented his bond, as required by law, which was approved by this Court, and ever since plaintiff has been and now is the duly appointed, qualified and acting Trustee of the estate of said bankrupt, all of which appears from the records of the Clerk of the above-entitled Court

: in those certain proceedings entitled "In the Matter of Brick O' Gold, a corporation, Bankrupt," and being No. 38320-G, In Bankruptcy, of said records.

3. That within four (4) months next preceding the filing of said involuntary petition in bankruptcy on November 9, 1949, and more particularly on September 12, 1949, and in the District aforesaid, and while said bankrupt, Brick O' Gold, a corporation, was then and there insolvent, defendants caused a writ of attachment to be issued and levied on property belonging to said Brick O' Gold, a corporation, bankrupt, which said writ of attachment was issued in that certain action entitled "J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, Plaintiff, vs. Brick O' Gold, Inc., a corporation, et al., Defendants," being action No. 258127 of the files and records of the Clerk of the Municipal Court of the City and County of San Francisco, State of California, which said action was filed on September 12, 1949, on a claim assigned to defendant, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, and also known as James R. Norberg, by the defendants, KJBS Broadcasters, a copartnership; and thereafter defendants, on October 5, 1949, caused a writ of execution to be levied on the property of the bankrupt, as a result of which there came into the possession of defendants the sum of One Thousand Seventy-Six Dollars and Forty Cents (\$1,076.40) which represented payment in full of defendants' claim; that at the time of the levy of the writ of

attachment defendants were generally and wholly unsecured creditors of said Brick O' Gold, a corporation, bankrupt; and in procuring, pursuant to the levy of said writs of attachment and execution, the said amount of One Thousand Seventy-Six Dollars and Forty Cents (\$1,076.40) which was the full amount of defendants' claim, it enabled defendants, as creditors of bankrupt, to obtain a greater percentage of their said debt than other creditors of bankrupt of the same class.

4. That at the time of the levy of the writ of attachment on September 12, 1949, defendants and each of them had reasonable cause to believe that the enforcement of the levy of attachment would effect a preference and that defendants and each of them, at the time of said levy and at all times thereafter, had reasonable cause to know that bankrupt corporation was then and there insolvent.

5. That other of said bankrupt's general and wholly unsecured creditors have filed in the bankruptcy proceedings of the said Brick O'Gold, a corporation, bankrupt, duly verified and proper proofs of their respective claims against its estate, which claims have been allowed and that the assets of said bankrupt estate are insufficient to satisfy the claims of said creditors in full.

#### Conclusions of Law

1. That plaintiff, Harry F. Meilink, as Trustee of the estate of Brick O'Gold, a corporation, bankrupt, have judgment against the defendants, J. R.

Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, in the sum of One Thousand Seventy-Six Dollars and Forty Cents (\$1,076.40), plus interest at the rate of seven per cent (7%) per annum from and after May 24, 1950, the date of the filing of the above-entitled action, together with plaintiff's costs.

2. That the complaint as to First Doe, Second Doe and Third Doe be dismissed.

It Is So Ordered and counsel for plaintiff will submit appropriate judgment in accordance here-with.

Dated: San Francisco, in said District; August 9th, 1950.

/s/ J. WATIES WARING,  
United States District Judge.

Receipt of Copy acknowledged.

Lodged August 3, 1950.

[Endorsed]: Filed August 9, 1950.

In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 29769

HARRY F. MEILINK, Trustee of the Estate of  
BRICK O' GOLD, a Corporation,

Plaintiff,

vs.

J. R. NORBERG, an Individual Doing Business  
as NORBERG ADJUSTMENT BUREAU;  
HOPE D. PETTEY, WILLIAM B. DOLPH,  
ALICE HUSTON LEWIS, HELEN S.  
MARK, ELIZABETH N. BINGHAM, D.  
WORTH CLARK, EDWIN P. FRANKLIN,  
GLENNNA G. DOLPH, Individually and Doing  
Business as Co-Partners Under the Firm  
Name and Style of KJBS BROADCASTERS;  
FIRST DOE, SECOND DOE and THIRD  
DOE,

Defendants.

#### JUDGMENT AFTER TRIAL BY COURT

This cause came on regularly for hearing before the above-entitled Court on August 1, 1950, and evidence, both oral and documentary, having been introduced and the further trial of said matter having been continued to August 2, 1950, at which time additional evidence, both oral and documentary, having been introduced and the matter having been submitted for decision, it was,

Ordered, Adjudged and Decreed that plaintiff,

Harry F. Meilink, as Trustee of the estate of Brick O'Gold, a corporation, bankrupt, have judgment against defendants, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, in the sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40), together with interest thereon at the rate of seven per cent (7%) per annum from and after May 24, 1950, and costs of action incurred herein, and that plaintiff have execution therefor.

Dated: San Francisco, in said District, August 9, 1950.

/s/ J. WATIES WARING,  
U. S. District Court Judge.

Approved as to form, as provided in Rule 5(d).

/s/ WILLIAM BERGER,  
Attorney for Defendants.

Lodged August 3, 1950.

[Endorsed]: Filed August 9, 1950.

[Title of District Court and Cause.]

**NOTICE OF APPEAL TO  
CIRCUIT COURT OF APPEALS**

Notice is hereby given that the defendants above named, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, hereby appeal to the Circuit Court of Appeals for the Ninth Judicial Circuit from the final judgment made and entered in this action on or about August 9, 1950.

/s/ **WILLIAM BERGER,**  
Attorney for Defendants  
Above Named.

[Endorsed]: Filed September 7, 1950.

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[Title of District Court and Cause.]

**CLERK'S CERTIFICATE**

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this Court in the above-

entitled case, and that they constitute the Record on Appeal, as designated by the parties, to wit:

### **Complaint to Recover Preference.**

### Answer.

## **Findings of Fact and Conclusions of Law.**

### Judgment After Trial by Court.

Notice of Appeal to Circuit Court of Appeals.

### **Designation of Record on Appeal.**

## **Supersedeas Bond and Bond on Appeal.**

**Appellee's Designation of Additional Portions  
of the Record on Appeal Under Rule 75(a).**

Affidavit of Service by Mailing of Additional Portions of the Record on Appeal.

## Order Extending Time to Docket.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6.

**Defendants' Exhibits Nos. A, B, C and D.**

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of November, A.D. 1950.

[Seal] C. W. CALBREATH,  
Clerk.

By /s/ M. E. VAN BUREN,  
Deputy Clerk.

[Endorsed]: No. 12747. United States Court of Appeals for the Ninth Circuit. J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. North Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, Appellants, vs. Paul W. Ryan, Trustee of the estate of Brick O' Gold, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 21, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 29769

HARRY F. MEILINK, Trustee of the Estate of  
BRICK O' GOLD, a Corporation,

Plaintiff,

vs.

J. R. NORBERG, an Individual Doing Business  
as NORBERG ADJUSTMENT BUREAU;  
HOPE D. PETTEY, WILLIAM B. DOLPH,  
ALICE HUSTON LEWIS, HELEN S.  
MARK, EDWIN P. FRANKLIN, GLENNA  
G. DOLPH, Individually and Doing Business  
as Co-partners Under the Firm Name and  
Style of KJBS BROADCASTERS; FIRST  
DOE, SECOND DOE and THIRD DOE,

Defendants.

REPORTER'S TRANSCRIPT

Tuesday, August 1, 1950

Appearances:

For the Plaintiff:

MAX H. MARGOLIS and  
JAMES M. CONNERS, ESQ.

For the Defendants:

WILLIAM BERGER, ESQ.

Tuesday, August 1, 1950, at 10:00 o'Clock A.M.

The Clerk: Meilink, Trustee, vs. Norberg, et al., for trial.

Mr. Margolis: Ready for the plaintiff.

Mr. Berger: Ready for the defendant.

The Court: Gentlemen, I had just a moment to glance at the pleadings. The real issue here is as to the insolvency of the bankrupt at the time of the judgment and execution, and the knowledge of the parties obtaining same, isn't it?

Mr. Margolis: That is correct.

The Court: That is the issue.

Mr. Berger: At the time of the attachment, your Honor.

The Court: At the time of the attachment.

Mr. Margolis: I was going to make an opening statement and point that out, two matters which we are required to prove, as your Honor has indicated.

The Court: Very good. Gentlemen, you may proceed.

Mr. Margolis: We will call as our first witness on behalf of the plaintiff Mr. Paul Loudolph.

### PAUL LOUDOLPH

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you state your name to the Court, please?

A. Paul Loudolph.

The Clerk: Proceed. [2\*]

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Paul Loudolph.)

Mr. Margolis: I showed counsel the original in the clerk's office, the involuntary petition and schedules, being the bankruptcy proceedings No. 38320G, which I want to show the witness, your Honor. The pleadings, as already indicated, constitutes the filing of the involuntary petitioned as denominated and set forth in paragraph 3.

The Court: And the appointment and qualification of the trustee.

Mr. Berger: Is that the entire file of the bankruptcy court?

Mr. Margolis: This is, Mr. Berger, the file from the Clerk's office here, the United States District Court, and I have here the claims which were filed with the referee in bankruptcy.

#### Direct Examination

By Mr. Margolis:

Q. Mr. Loudolph, I show you file No. 38320G being the proceeding in the matter of Brick O'Gold, bankrupt, and direct your attention to the schedules and ask you whether this is your signature at the foot of each and every page of the schedules?

A. That is my signature.

Q. And you were President of the bankrupt corporation, is that correct? A. Yes, sir.

Q. Prior to executing and signing the schedules did you [3] examine all the information contained on the several pages which comprise these schedules? A. Yes, sir.

(Testimony of Paul Loudolph.)

Q. And who gave that information to you, it was your attorney who prepared it for you, isn't that correct? A. Correct.

Q. Now, can you tell us on or about September 12th, or on September 12, 1949, whether all of the assets of the bankrupt corporation, at the fair market value, was sufficient to pay all of your creditors in full?

Mr. Berger: Just a moment, that is calling, not only for an opinion and conclusion, but also calling for hearsay evidence and the records, if he has records, would be the best evidence, and so no foundation has been laid for a question of that kind.

The Court: I don't think that is too general. I think he can tell what his assets were and what his liabilities were.

Mr. Margolis: I think also, if I may be heard, your Honor, an individual owner of property, of a corporation, where one is familiar with what the corporation has is in the best position to tell the value of it. That was the purpose of it.

The Court: Yes, but I think perhaps instead of saying corporation you might say I have a dollar and I owed \$10, and the judge can draw a conclusion.

**Mr. Margolis:** Very well, your Honor. [4]

Q. Can you tell us, Mr. Loudolph, were you in active conduct of the corporation's business in September, 1949? A. Yes, sir.

Q. Do you know what the assets and liabilities of the corporation consisted of? A. Yes, sir.

(Testimony of Paul Loudolph.)

Q. Can you tell the Court substantially what the assets were on September 12, 1949?

A. Well, the market value of the assets were approximately—

Mr. Berger: Just a moment. I will object to that, your Honor. The question was what were the assets, not what were the value of the assets.

The Court: What were the assets, and then you may value them. What did the assets consist of, real estate, personal property, manufacturing merchandise?

A. The assets consisted of plant and equipment, accounts receivable, notes receivable, very little cash, truck equipment.

Q. (By Mr. Margolis): What was the general nature of the business so the Court will understand the situation?

A. The general—the business we had was a manufacturing plant in Redwood City where we manufactured and distributed the products that were sold. We used it as a warehouse, products that were sold in 13 franchise stores. We had 13 dairy product stores, supplied them from a central warehouse in Redwood City.

The Court: What was the general nature of the products you [5] manufactured?

The Witness: Practically our main product was ice cream, and sold cheese and eggs and butter, milk.

(Testimony of Paul Loudolph.)

Q. Did the corporation own this equipment you speak of free and clear?

A. No, we had a chattel mortgage with the Pacific National Bank, San Francisco.

Q. And was that property subsequently sold by the bank? A. Yes, they sold it.

Q. And what was the balance due and owing the bank at the time of the levy of this attachment on September 12, if you know?

A. \$9,000, plus a small amount of interest, but the loan was \$9,000.

Q. And what did the property bring upon sale?

A. \$5999.99.

Q. \$5999.99. Now, were all of the accounts receivable collectable on September 12, 1949?

A. No, one of our main troubles was that the accounts receivable were not collectable. The stores were not doing well.

Q. Now, you have set forth here under schedule A-3 the list of the names, addresses and amounts of the unsecured creditors, is that correct? Will you take a look at the schedules which you signed? [6]

A. This is a correct list of our creditors.

Q. And now much was owing at the time of the execution of the schedules?

The Court: That was in November?

Mr. Margolis: That is correct.

A. About \$43,000 on these unsecured. I notice some salaries in here, might make that a little higher.

(Testimony of Paul Loudolph.)

Q. Yes. Was the amount more or less on September 12, 1949?

A. No, it was approximately the same because we got—our situation became so bad that we had to pay cash for everything. We operated on a COD basis; everybody put us on a COD.

Q. Now, outside of the accounts receivable, did you have any other assets?

A. We had some notes on balance due of stores that was pledged to the Pacific National Bank along with the plant and equipment.

Q. Did you have any equity in those notes on September 12, 1949?

Q. Yes, we had some equity—I don't know, because the bank still has the notes and they realized \$6000, or \$5999, and I don't know just how they came out on the balance. I know it made some settlements, but they were very low.

Q. Were all of the equity or value of the notes plus whatever could be recovered on the accounts receivable and any other assets you had sufficient to pay the general creditors? [7] A. No.

The Court: What were the accounts receivable as shown in the petition for bankruptcy? Aren't they set out in the assets?

Mr. Margolis: They are, Your Honor.

The Witness: I could give them at the time very closely but—

Q. (By Mr. Margolis): Look at schedule B-3. Probably not familiar with the caption, the witness isn't.

(Testimony of Paul Loudolph.)

The Court: Yes, you find it for him.

Q. (By Mr. Margolis): The court wants to know what the accounts receivable were, Mr. Loudolph? You find them under schedule B-3.

A. They are in a total of approximately \$13,500, some cents.

Q. Did you have any other assets?

The Court: You say those accounts receivable were not very good, there were not a great many of them collectable?

The Witness: They weren't collectable because the stores were not making money. We gave this credit to hope for the better, which never happened. If we ever tried to collect these the stores would have to close.

Q. (By Mr. Margolis): Did you owe any taxes also, Mr. Loudolph? A. Yes, sir.

Q. Will you look at Schedule A-1 and tell how much in taxes you owed; schedule A-1 as set forth there. A. \$976. [8]

Q. I notice also on the schedule A-4, signed by yourself as president of the Brick O'Gold, that there was an obligation to the Morris Plan in the sum of \$14,866.

A. That is a contingent liability. The stores bought—when the people bought the stores they financed with the Morris Plan, some of them did. We went on the notes along with them as a contingent liability.

Q. And at the time of the attachments, Sep-

(Testimony of Paul Loudolph.)

tember 12, 13, 1949, did you owe the Morris Plan any money?

A. Did we owe them besides this contingent liability?

Q. Yes.

A. We owed them a small amount, maybe \$2000. It was covered by the truck equipment and automobile.

Q. I see.

Mr. Margolis: Now, I exhibit to counsel, Your Honor, the claims from the clerk's office being 31 in number.

The Court: Unsecured creditors?

Mr. Margolis: That is correct, Your Honor. I haven't run a total on them as yet, Your Honor. I just picked them up this morning. They represent the claims approved and allowed. Subject to checking, however, if Your Honor please, in that file of secured claims, which of course we have to leave out in our computation of the unsecured creditors, for the purpose of having counsel examine the file so that I can exhibit it to the witness—— [9]

The Court: Can you state whether they are approximately the same as that shown in the petition schedules?

Mr. Margolis: Schedules—that, I don't know without checking, Your Honor. Often times in the matters creditors phone in to inquire what possible assets are in a certain case and won't go to the trouble or expense of a Notary fee to prepare a claim. These claims came into the clerk's office;

(Testimony of Paul Loudolph.)

there are 41. There may be one or two more secured claims. There are, however, sufficient unsecured claims to my knowledge to establish the percentage theory which we allege is one of the elements and with which there is no dispute.

Mr. Berger: I don't know what he means by dispute, I don't know if it is a disputed fact. I haven't gone into the matter. I feel from our evidence we will prove that they were not even entered, and don't have any point in going into these claims, but I can't see—I don't dispute them; however, it is assumed I must dispute them, I don't know anything about them, I haven't seen them until now. However, to save the time of the Court, if the Court desires to admit them, giving me a chance later—

The Court: Yes, you may do that, and I should like, before we close the case to know the total, have a total run.

Mr. Margolis: I will undertake to do that, Your Honor, and I might add if counsel is correct in part as we have stipulated at the beginning of the case the only issues is the [10] questions of insolvency of the corporation and the knowledge by the defendants and this attempt to offer these claims, merely information for the Court. However, if they are immaterial they will be disregarded. If Your Honor wishes to know the amount I will run a total and counsel can check it and I will offer it to the Court at the afternoon session.

The Court: After the noon recess give me a total.

(Testimony of Paul Loudolph.)

Mr. Margolis: Yes.

Q. The schedules which you hold show indebtedness in excess of \$40,000, the schedules you hold in your hands, unsecured creditors?

A. Yes, sir.

Q. And the assets which you have told us about comprise these accounts receivable, and you mentioned something about some personal property which was mortgaged, and did the corporation receive any equity out of the sale of that property?

A. No, sir, you mean the plant and the equipment?

Q. That is correct. A. No, it did not.

The Court: On any real estate?

A. No, sir, it was all machinery and office equipment.

Q. (By Mr. Margolis): The corporation didn't own any real estate? A. No, sir. [11]

Q. No stocks or bonds? A. No, sir.

Q. And did the condition of the corporation between September 12 and the date of the filing of the involuntary petition on November, I believe it was the 9th—

The Court: November 9th.

Q. November 9, get better or worse?

Mr. Berger: Just a moment. If Your Honor please, that certainly is calling for a conclusion unless some proof either by books or records, as to whether they got better or worse. Merely a statement, a bald statement without any foundation whatsoever—I will object to that statement.

(Testimony of Paul Loudolph.)

Mr. Margolis: It seems to me if the witness was an active operator of the business, Your Honor, he would be one who would know whether the business improved or whether it didn't.

The Court: Ask him generally what the condition of the business was on September 12.

Mr. Berger: The point in issue, Your Honor, would be that in September of 1949, but not in November as to whether it changed or not, because the books themselves would disclose that.

The Court: He may state on September 12, 1949, what was the condition of the business, approximately what were the assets, liabilities and so forth. [12]

Q. (By Mr. Margolis): Will you answer the question?

A. The situation of the corporation on September 12 was just about the same as it was in this.

Q. As set forth in the schedules? A. Yes.

Mr. Berger: I move to strike out the answer as not responsive.

The Court: I will allow that in. He stated on November 12, what the condition was. He says as President of the corporation that on September 12 it was in approximately the same condition.

The Witness: I would say the only change was some labor. We weren't paying our labor in that period, and got slightly worse because of the labor, by buying everything on COD, on a COD basis.

The Court: Weren't paying your labor?

The Witness: No.

(Testimony of Paul Loudolph.)

The Court: You mean you didn't keep up with your wages? A. That is right, sir.

Q. (By Mr. Margolis): And why didn't you pay your labor?

A. We didn't have the money.

Q. Now, do you know Mr. Norberg who is sitting here in the Courtroom? A. Yes, sir.

Q. And can you tell the Court when you first met Mr. Norberg?

A. I first met Mr. Norberg in what we call the Lakeside Store [13] on Ocean Avenue.

Q. Could you tell us the date, approximately?

A. About the 8th of September.

Q. Of 1949?

A. 1949, right in there. It was a Saturday.

Q. Who was present at that meeting?

A. Mr. Norberg, Miss Lee, who is in the courtroom.

Q. She was an officer of the corporation?

A. Yes, sir.

Q. Yourself and Mr. Norberg?

A. Yes, sir.

Q. Can you tell the Court the reason for Mr. Norberg's visit or invitation to the Lakeside place of the bankrupt corporation? A. I think—

The Court: Mr. Margolis, isn't it the rule of this Court that counsel stand?

Mr. Margolis: I beg your pardon; I am sorry.

Q. Go ahead.

A. Mr. Norberg phoned me in the morning. He said he wanted to have a talk with me, and I said,

(Testimony of Paul Loudolph.)

well, we could talk if he wanted to come up on a Saturday afternoon. He said, I will come right up, and he came up and I had some facts and figures at my disposal there.

Q. Did he tell you what he wanted to come up about?

A. Told me he wanted to come up about KJBS indebtedness. [14]

Q. Yes. And he came out to the place on Lakeside Street? A. Yes.

Q. How long a time did he spend there?

A. Well, we had a long chat, probably half hour, twenty-five minutes, half hour.

Q. Can you tell the court what you said and what Mr. Norberg said in response to your statements and visa versa?

A. Mr. Norberk was very cooperative with me and we went over—I had a financial statement, I went over the financial statement and the conditions of the corporation with Mr. Norberg. I explained to him what our difficulties were, that we were seeking new capital and we had a couple of good prospects to come in with us and if the people we owed money to would go along with us we might be able to pull it out, but if we didn't we weren't to get any new capital we couldn't pay anyway. And Mr. Norberg was cooperative and I gave him all of the information that I had, explained the situation about the stores, they weren't doing well and although it looked like we had some accounts receivable some of them were uncollectable and that we

(Testimony of Paul Loudolph.)

were just in bad shape if we didn't get this new capital in.

Q. And what did Mr. Norberg say in response to your explaining to him what the situation was from this financial statement, if you can tell us?

A. Mr. Norberg didn't comment very much, more or less listened [15] to what I was telling him.

Q. Yes. And was Miss Lee present at this conversation, or was she about the premises?

A. She was working in the store.

Q. She didn't hear anything that went on?

A. I don't know, but she wasn't active in the conference.

Q. What else was said by you to Mr. Norberg and by him to you at that time?

A. Well, the main theme of the conversation, as I was explaining to Mr. Norberg the serious condition of the corporation and the figures.

Q. Did you discuss with him the financial condition of the corporation at that time?

A. Yes, I had the financial statement with me.

Q. And did you go over it in detail, the items set forth in the financial statement?

A. Yes, we did, I went over with him—

Q. And what if anything did he say at the conclusion of that conference?

A. Well, the best of my knowledge he said he didn't know what he was going to do. My efforts with Mr. Norberg were to try and convince him that there was no value in starting an action, if he did something like that it would ruin our chances to get

(Testimony of Paul Loudolph.)  
new capital, and there was no decision made by Mr. Norberg at that meeting. [16]

Q. Did you discuss with him that you were having financial difficulties at that time?

A. Yes, we were definitely.

Q. And you told him all the details in connection with the business?

A. It was common knowledge. Even KJBS, his client, had been talking with us.

The Court: Yes, he could see what was coming.

Q. Yes. Just tell us, you stated to Mr. Norberg at that time with respect to the financial condition of the corporation and enumerated that it is common knowledge?

A. Yes, I went over it with great detail with Mr. Norberg.

Q. And he left after you had about a half hour's conference? A. Yes.

Q. Within a few days this attachment suit was brought? A. Yes.

Q. Did you have any discussions or conferences with Mr. Norberg after the attachment?

A. Yes, Mr. Norberg closed up two of our stores. He worked closely with a Mr. Kolb.

Mr. Berger: I move to strike the answer as not responsive to the question, any other conferences with Mr. Norberg after that time, only confine himself to the question.

The Court: I don't think—he says that he closed the stores by this attachment and worked through Mr. Kolb, the [17] attorney.

Mr. Berger: I understood the question to be any

(Testimony of Paul Loudolph.)

other conferences with Mr. Norberg after that time.

Mr. Margolis: I will get to that point, Your Honor.

Mr. Berger: I thought that was the question.

The Court: I don't think we have come to that point.

Q. (By Mr. Margolis): Now, subsequent to the levy of the attachment, which is stipulated as September 13, 1949, did you meet with Mr. Norberg?

A. Met with Mr. Norberg in Mr. Kolb's office.

Q. Who is Mr. Kolb? He is an attorney?

A. He is an attorney.

Q. Representing a creditor?

A. Yes, Pacific Mechanical and Electrical Company.

Q. What?

A. Pacific Mechanical and Electrical Company.

Q. One of the creditors listed in the schedules?

A. Yes, sir.

Q. How soon after the attachment did that conference take place, Mr. Loudolph?

A. Well, it was the latter part of the same week that the attachment was levied. The purpose of the meeting was to—with Miss Lee and myself were there and we tried to get, release those attachments.

Q. Who called the meeting? [18]

A. Mr. Kolb called the meeting.

Q. He is representing this Pacific Mechanical and Electrical Company?

A. Yes. The meeting, I might say, was called by both of those gentlemen, because they were both present.

(Testimony of Paul Loudolph.)

Q. Yes. And who asked you to appear there, Mr. Norberg or Mr. Kolb? A. Mr. Kolb.

Q. Could you tell us substantially what was said, naming each one who said it, as you recall it now?

A. Well, we went over it, the figures again.

Q. What figures are you talking about?

A. The financial statement of the corporation and our difficulties and again the same story as was told Mr. Norberg. I told Mr. Norberg out at the Lakeside Store we were trying to get new capital, if they did that they were killing our chances to get new capital while these stores were closed and that we would like to have them release the attachment to open them up again and at that time Mr. Norberg and Mr. Kolb tried to get me to make a preference on their claim. They tried to get me to give a note on the corporation and personally guarantee Miss Lee and myself, and I refused to do that. I said that would be an act of bankruptcy, and it would be a preference. Mr. Kolb says we had already committed bankruptcy when this accounting company had sued us some months before and [19] that we should go ahead and give them the preference. But I wouldn't give them the preference, and Mr. Norberg got a little heated. Mr. Norberg made the statement that he didn't care about—I brought up the fact that how could I give a preference to one against all of these others, and he said he had no interest in these at all, that he was interested in getting his money, not interested in the fact we

(Testimony of Paul Loudolph.)  
owed the other people money, and he wanted his and  
he was going to collect it.

Q. Did you explain to him that you owed other  
people money and couldn't pay it?

A. Yes, sir. On the financial statement there  
was over \$3000 accounts payable.

Q. And the assets you told us was substantially  
what you have related a few moments ago?

A. Yes, sir, they did not change.

Q. Now, how long did that conference last, ap-  
proximately?

A. I would say that conference lasted—these  
attorneys, as you know, some of the attorneys—his  
phone keeps ringing, probably in there, probably 35  
minutes.

Q. But the actual—

A. But the interruptions—

Q. You were there 35 minutes with the interrup-  
tions, but the actual conference we are speaking  
about was going on among the various parties, in-  
cluding yourself, the other attorney, Mr. Norberg  
and Miss Lee, about how much time would that  
take? [20]

A. I would say 20 full minutes.

Q. 20 full minutes. Now, was there anything  
else said during that time that you can recall by  
any of the parties; name them and state what was  
said?

A. Mr. Norberg left then and I talked with Mr.  
Kolb. I was still trying to get him to release these  
two stores.

(Testimony of Paul Loudolph.)

Q. Up to that point I am going to stop you, it wasn't said in the presence of Mr. Norberg, I don't want anything mentioned about anything else, I don't think that would be—

The Court: Only when Norberg was present.

Mr. Margolis: That is correct.

Q. Now, was there anything else that transpired when Mr. Norberg was present? Did you hear what I said, I don't want anything stated about what was said after Mr. Norberg left.

A. I understand.

Q. Can you tell us anything else, if anything did take place?

A. Well, Mr. Norberg, he took a look at our financial statement with Mr. Kolb. They seemed quite optimistic. He said they will close this place up and we will get a dividend of something like 75 per cent. I said, if you close this business up you won't get any dividend, so far as I can see.

Q. Then the meeting broke up, did it?

A. Yes, sir.

Q. Did you speak with Mr. Norberg subsequent to that meeting and prior to the execution in October; was there any other [21] conference held after that meeting?

A. You're speaking before we had a meeting again with Mr. Kolb?

Q. I mean with Mr. Norberg.

A. No, not to the best of my knowledge.

Q. You say no. Did Mr. Kolb's client that you mentioned get any monies during that time?

(Testimony of Paul Loudolph.)

Mr. Berger: Just a moment, I think that is beyond the issue here.

The Court: I rather think that is immaterial.

Mr. Margolis: Very well, Your Honor.

Q. And then in October execution was levied and the monies were picked up from these accounts receivable, is that correct?

A. I know it is correct, but I have no knowledge of it.

Q. Of the amount?

A. What they did by the attachment.

Mr. Margolis: No question in the pleadings the amount set forth in the complaint is conceded.

The Court: The amount is admitted, isn't it?

Mr. Margolis: That is correct.

Mr. Berger: Yes, your Honor.

Mr. Margolis: You may cross-examine.

### Cross-Examination

By Mr. Berger:

Q. Mr. Loudolph, you are the President of the corporation called Brick O'Gold? [22]

A. I was at that time, sir.

Q. At that time, yes. And did the corporation have stock issued? A. No, sir.

Q. Was there ever any stock issued at all by the corporation to anyone? A. No, sir.

Mr. Margolis: We object to the question, may it please the Court. It is incompetent, irrelevant and immaterial, not within the issues.

(Testimony of Paul Loudolph.)

The Court: Well, I don't see where it is within the issues, but it may be.

Mr. Berger: For this reason, Your Honor.

The Court: Was it a corporation?

Mr. Berger: It was a corporation, admitted it was incorporated, I assume it was.

The Witness: Yes, sir.

Q. (By Mr. Berger): Had this corporation a franchise from the State of California?

A. Yes, sir.

Q. And did the corporation ever make any application to issue stock? A. No, sir.

Q. It did not?

A. We were preparing when we got into [23] difficulties.

Q. And did the corporation or franchise, show how many shares you would own or how many shares you would have in it?

Mr. Margolis: We renew the objection, Your Honor, no issue wherein the corporation is the bankrupt's business as a trustee.

The Court: I rather think that I could very well find out what the purpose it—

Mr. Berger: I will agree to a motion to strike if it is immaterial, Your Honor.

Q. Now, Mr. Loudolph, did you invest any cash in the corporation yourself? A. Yes, sir.

Mr. Margolis: May the objection go to all this line of questions so I don't have to interrupt the Court?

(Testimony of Paul Loudolph.)

The Court: Objection to all this line of questions.

Q. And did you make application—you say your application was being prepared? A. Yes, sir.

Q. And did you show how much stock was going to be issued to you? A. Yes, sir.

Q. How many shares?

A. The Attorney—in the amount of 15—\$16,500.

Q. \$16,500 would be issued to you, is that correct? A. Yes, sir.

Q. Now, did you pay into the corporation [24] \$16,500?

Mr. Margolis: Just a moment—

Mr. Berger: That is an asset of the corporation if he is obligated to pay it. That is the purpose of the question.

Mr. Margolis: At that point I wish to object to the question as incompetent, irrelevant and immaterial, not within the issues of this case.

Mr. Berger: He testified what the corporation—

The Court: That might be an issue as to whether it was bankrupt or not.

Mr. Berger: That is what—if it had an asset not listed they have a claim that isn't listed and may not be bankrupt. We don't know, we take the facts as we find them.

The Court: That is all adjudicated in bankruptcy, isn't it?

Mr. Berger: Those inventory sheets—

Mr. Margolis: That is correct, Your Honor, it

(Testimony of Paul Loudolph.)

is res judicata. I don't think at this time we can go into that question.

The Court: The District Court has adjudicated this corporation a bankrupt.

Mr. Berger: That is correct.

The Court: You are not attempting to upset that?

Mr. Berger: Going to assets that the bankruptcy court didn't know about.

The Court: Any more assets, that is just good news for the creditors. [25]

Mr. Berger: Find out, maybe it slipped, at that time there were sufficient assets if he had paid his obligation under the stock.

The Court: You may see if there was, fixing, if it was in November when it went bankrupt.

Mr. Berger: That is what he states.

The Court: That is about \$43,000 unsecured creditors and assets are very little.

Mr. Berger: Yes. Now, may I have that question answered whether or not he has paid the \$16,500 for the stock to the corporation?

The Court: Well, I will allow him to answer that.

A. The exact figure did I pay it in cash?

The Court: Did what?

The Witness: Did I pay it into the corporation?

Q. Yes.

A. My interest payment was in the form of a cashier's check made out to the Pacific National Bank in the sum of \$15,000, which was turned over

(Testimony of Paul Loudolph.)

to the corporation, deposited to the corporation. The balance was—I turned over a Chevrolet 1946 four-door sedan which I valued at that time at \$1500, and the corporation subsequently paid about \$400 off that I owed on it, and that—this is what my contributions into the corporation were, in the form of a cashier's check.

Q. Was it your money? [26]

A. It was my money.

Q. Now, any other stock issued to anyone else, or should have been issued to anyone else, members of the corporation? A. Yes, sir.

Q. Did they pay cash for the stock?

A. Every nickel.

Q. All right. Now you had a lease on the premises, did you not? A. Yes, sir.

Q. Did you have any security on the lease?

A. Yes, sir, \$1500.

Q. And what happened to that security?

A. We—well, I guess kept it as a security on the lease when we no longer paid.

Q. Coming back to the question of assets of the corporation as of September, 1949, you have your list of liabilities and assets set forth in this schedule. Where did you get this information, Mr. Loudolph?

A. The information from our assets, from our liabilities?

Q. Yes.

A. The last financial statement that we had was prepared by Burrows C.P.A.

Q. Do you have that financial statement?

(Testimony of Paul Loudolph.)

Q. I turned over the papers of the corporation to Mr. Meilink when he was appointed trustee. He asked me to send every paper. [27]

Mr. Berger: That is why I asked that question, if these are the complete bankruptcy records.

Mr. Margolis: I found these were voluminous and the records, as Your Honor knows, were turned over to Mr. Meilink, representative of the Board of Trade. I might add, Your Honor, Mr. Meilink is ill and under the care of a physician. We have the books necessary. I will bring a certificate out in that regard.

Mr. Berger: Your Honor, he was testifying from memory as to what the financial statement showed. I objected and I wanted the books.

The Court: You know, he says that he signed this petition on information obtained from his book records.

Mr. Berger: Yes.

The Court: Doesn't have to be the bookkeeper himself.

Mr. Berger: That is true, but I think the books are the best evidence, particularly if it is based upon a so-called financial statement which seems to be the crux of the case which was presented in October and September to Mr. Kolb and Mr. Norberg. Now, I asked him if he has those financial statements.

The Court: And he says they are not—

Q. (By Mr. Berger): Where are they?

A. The financial statement was as of July 31, 1949.

(Testimony of Paul Loudolph.)

Q. Where is that financial statement? [28]

A. Mr.—All the records of the corporation was turned over to Mr. Meilink.

Q. Did you turn the office copy of that statement over to him?

A. Yes, sir, he has typed copies, I believe, from the work papers from the C.P.A.

Q. Did you make up a financial statement in October?

A. The last financial statement we made was—by the C.P.A. was as of July 31, 1949.

Q. Is that the same financial statement that was shown to Mr. Norberg in September and Mr. Kolb in October? A. Yes, sir.

Q. Same one, there was no other financial statement made after July, is that correct?

A. That is correct.

Q. Now, you say you had a number of accounts receivable for equipment, notes receivable, and so forth, and you had a number of franchise stores, about 13 of them, you stated?

A. That is correct.

Q. Were they all franchise stores or just some of them?

A. Well, originally we had sold the 13 as franchise stores. Subsequently to that we had to take three or four of them back.

Q. Now, as of September how many did you have? A. Operating stores, 13. [29]

Q. Franchise stores in September?

(Testimony of Paul Loudolph.)

A. I don't understand the difference between operating stores and franchise stores.

Q. You are the one that made the statement; you said you had 13 franchise stores, is that how many you had in September or did you have more or less in September of franchise stores?

A. We were operating two, so we had eleven franchise and operating two which we—our franchise didn't release the people from the obligation, just kind of picked up and we operated the store for them.

Q. So you had eleven franchise stores in September, not 13, is that correct? A. Yes.

Q. I see. All right, now, you had two operating stores that were formerly franchise stores. What do you mean by franchise stores, Mr. Loudolph?

A. The party who run the store had purchased it.

Q. Purchased it from whom?

A. Well, we built the stores and put in all of the equipment and all the things necessary to open it and we sold it at cost to the purchaser with the franchise to buy our products.

Q. Did they pay you for that store?

A. They paid us some down payments in cash, and in some cases we took a note for the balance.

Q. Secured by a chattel mortgage? [30]

A. No.

Q. You just made an outright sale, took an open note for the balance?

(Testimony of Paul Loudolph.)

A. Yes, sir, because most of the store owners had financing of their own under the Morris Plan and the Bank of America.

Q. So you guaranteed those notes to the Morris Plan, is that correct? A. That is correct.

Q. So therefore the mortgages were on the equipment and you guaranteed that mortgage, is that correct? A. Yes, sir.

Q. And the stores then—how much money did you receive for the various stores, do you know offhand?

A. Well, about four of them were—paid cash. The cash price varied from \$7200 to \$7950.

Q. They paid all cash?

A. Some did, one, two or three paid all cash; some paid \$3000 down, various amounts.

Q. You had some equity in most of those stores, did you not, Mr. Loudolph?

A. We had notes on the balance due on about four of them; four or five.

Q. Now, the list of unsecured creditors that you had, that you talked about, was that the same list that was unsecured in October, in September of 1949, or November, which? Do you know [31] offhand, or without referring to your books?

A. The list was primarily, it was the same with the exception of an accounting bill that was to come in, and an attorney bill that was to come in and some additions in labor. Aside from that it was the same.

Q. Yes. When did you go on a C.O.D. basis, Mr.

(Testimony of Paul Loudolph.)

Loudolph, with the various creditors that you had?

A. Sometime in August.

Q. In August. Up to that time—

A. We put our stores on a C.O.D. basis and then we paid on a C.O.D. basis. We didn't give the store any more credit.

Q. When were you on a C.O.D. basis with some of your creditors? A. Yes, sir.

Q. When was that? A. In August.

Q. You did that voluntarily?

A. No, began to get behind.

Q. Yes.

A. Only way we could get our materials.

Q. Now, you stated that your liabilities were the same, approximately the same in September as in November? A. Yes, sir.

Q. And that with the exception that you didn't pay for the salaries in November?

A. Yes, and the exception that we had, that accounting bill [32] still due and the attorney work.

Q. And didn't you—

A. Some smaller ones.

Q. Didn't you withdraw from your cash fund the same amount of money, at least don't your books show that you withdrew from your account fund the amount of the salaries you should have been paying to the employees?

A. Stopped salaries in July, took no salaries, the offices took no salaries after July.

Q. The salaries you referred to were the officer's salaries? A. No.

(Testimony of Paul Loudolph.)

Q. What were the salaries you were referring to?

A. I am referring to the driver and the girl in the office.

Q. Was the driver a member of the corporation?

A. No, sir.

Q. Was the girl in the office? A. No, sir.

Q. Did they get paid since July?

A. Small amounts, but there is still a balance owing to them.

Q. And you did not deduct that, the amount of monies due them, those two only, from your cash fund?

A. No, we paid them as we could, gave them sometimes, gave them \$50 on account of their salary, paid as we could and when we had to close we owed them approximately \$400 each. [33]

Q. Coming back to the conversation that you first had with Mr. Norberg when he called upon you in September, you showed him the financial statement at that time, did you? A. Yes, sir.

Q. You are positive of that?

A. I am, I had it right there.

Q. And did you go over it thoroughly with him?

A. Yes, sir.

Q. Did you tell him at all that you were expecting new capital to come in? A. Yes, sir.

Q. And did you tell him where you were going to get new capital?

A. I don't know. We were working with a man named Pate.

(Testimony of Paul Loudolph.)

Q. He was a man who used to call on you and he was anxious to come in with you?

A. The main reason I brought up that with Mr. Norberg, I told him he would make our chances very slight if an action was put on at this time.

Q. Slight for what?

A. To get additional capital that would put us on our feet.

Q. Did you mention anything at all about getting a loan from R.F.C.?

A. Yes, sir, we were working with our R.F.C.—probably came out in the conversation. [34]

Q. Probably did—what happened?

A. We didn't get it.

Q. Did you make application for it?

A. Yes, an application in the sense that I had about four conferences—they don't take applications in the R.F.C. unless it is going to go through, but they talk with you. I had the Pacific National Bank introduce me, but I had quite a few conferences with the R.F.C. but they didn't think that it was worth while to put in an application.

Q. In other words, your business was too small for them to invest in?

A. I don't think it was a matter of size, it was just that the statement didn't look good enough.

Q. Is that the same financial statement you are talking about? A. Yes, sir.

Q. The same one you showed to them?

A. Yes, sir.

(Testimony of Paul Loudolph.)

Q. Now you said you afterwards went in to see Mr. Kolb; is that the man's name? A. Yes.

Q. At his office? A. Yes, sir.

Q. The same week that the attachment was levied?

A. It was shortly after, I would say.

Q. And did you show Mr. Kolb the same financial statement? [35] A. Yes, sir.

Q. Did you leave a copy of it with him?

A. I may have.

Q. You may have, and at that time did you discuss your financial standing with Mr. Kolb when Mr. Norberg was present? A. Yes, sir.

Q. And do you remember what Mr. Kolb told you?

A. Yes, we went over the statement and the facts of the case and I explained that about the accounts receivable and their interest, the two gentlemen's interest were collecting for their own clients.

Q. I didn't ask you about interests, I asked you what he said. Do you remember what he said?

A. I told—Mr. Kolb said we didn't appear to be bankrupt on our statement.

Q. And what did you tell him at that time?

A. Then I went into the details of the uncollectable items and how much he would get for the plant and equipment if it was closed.

Q. And did you tell him that you thought that you were bankrupt according to your statement?

(Testimony of Paul Loudolph.)

A. I told him that we were insolvent, we couldn't pay our bills.

Q. And he told you it was his opinion that you were not insolvent? A. Yes, sir.

Q. And isn't it a fact that you yourself told him you were [36] solvent; isn't that correct?

A. No, sir.

Q. You are positive of that?

A. Yes, I am.

Q. Now, you made some statement awhile ago, Mr. Loudolph, about a preference. What do you mean by a preference? Do you know what a preference means?

A. The only thing I know what a preference means, pays one client against the others. I told him that we had no money and that we couldn't pay Mr. Norberg, it wouldn't be fair to the other creditors not to pay them equally.

Q. And did you tell him that that would make it a preference, you had no thought of going into bankruptcy at that time, did you, Mr.—

A. Yes, we had thought of it.

Q. Well, but you never filed a petition on your own account, did you?

A. No, sir, but I was advised by my attorney to do it.

Q. And your idea of a preference was that you would pay one and not the other, is that what you mean? A. That is right.

Q. Did you pay any other bills besides that of Norberg's and not all the bills?

(Testimony of Paul Loudolph.)

A. No, sir, only on a C.O.D. that we were able to operate. The telephone bill may be excepted. [37]

Q. And was there any conversation between you at that time and with Mr. Kolb that according to the statement he told you that he would get about 75 cents on the dollar? Was there any discussion with that?

A. Yes, he said that—they were giving me a rather rough time, and they said, well, this statement shows, gets 75 cents on the dollar, and then I went over it with them again and told them there wouldn't be any, if fact, there wouldn't be enough assets to cover the liabilities.

Q. And coming back to the statement of your presenting and preparing and showing to the R.F.C., that is, a statement that you had hoped would be used by the R.F.C.—withdraw that. Is that the statement you intended the R.F.C. to use to get your further financing?

A. Yes, sir. As I remember it was the same financial statement.

Q. And that showed you then were in a bankrupt position, did it?

A. As—if we could get more money, as were seeking from the R.F.C., probably been able to continue.

Q. I asked you whether or not that statement showed you were in a bankrupt position. Did it or did it not show that?

A. Will you explain to me what you mean by a bankrupt condition?

(Testimony of Paul Loudolph.)

Q. You yourself made the statement, according to your statement you were insolvent. That is what I want to know, [38] what you mean?

A. We had no money, we had—we couldn't collect in our accounts receivable showed as assets, we could collect on our notes showed as assets maybe a small amount of cash, two or three or four hundred dollars, and we had no way of paying our bills.

Q. Well, is that the financial statement that you showed to the R.F.C. with the purpose and intent that they should lend you money on your business, is that correct?

A. That is right, if they loaned the money the situation would have changed.

Q. Do you have any copies of that financial statement of July, 1949?

A. I haven't personally, but they are available. I turned them over to Mr. Meilink.

Q. Now, Mr. Loudolph, you said that you had franchise contracts with various stores, eleven of them, that they bought the merchandise and equipment, whatever it was, gave you cash and a note for the balance, and under that franchise permitted them to use your product. Now, what else was there with reference to that franchise as far as assets is concerned. Do you know?

A. Unless you would consider the good will of the name, which didn't work out, didn't become any good will.

Q. Did anyone ever test, to your knowledge, the

(Testimony of Paul Loudolph.)

legality as [39] to whether or not those franchises were or were not good?

Mr. Margolis: We object to the question, may it please your Honor, on the ground it is incompetent and irrelevant and immaterial.

The Court: I don't quite see that it is relevant, but I will allow it.

Mr. Berger: Only a preliminary question, your Honor.

The Court: If it is preliminary.

Mr. Berger: Thank you, your Honor.

The Witness: Could I have the question again, please?

Q. (By Mr. Berger): Did anyone ever test, to your knowledge, the legality of those franchise contracts?

A. No, they didn't, not to my knowledge. There was some threats made to do it, but to my knowledge I have never been served with any papers to test that.

Q. You have not. All right. I call your attention, Mr. Loudolph, of a judgment recovered against you in the Superior Court of California in and for the County of San Mateo, being No. 50219—

Mr. Margolis: May I interrupt before counsel reads something into the record? I think in the ordinary course of a trial there should be afforded—

Mr. Berger: I am reading, if your Honor please, from a list or statement put out in the corporation,

(Testimony of Paul Loudolph.)  
read before the Court, filed by Judge Wyman, reading from their own records.

The Court: Filed with the records in this case?

Mr. Berger: Part of the bankruptcy records.

Mr. Margolis: Part of the record, may it please your Honor, so the Court will not be confused with the proceedings now pending before Judge Wyman in bankruptcy. I am familiar with the document. As a matter of fact, I prepared the information from which this notice was sent to all creditors.

Mr. Berger: I am reading now, if your Honor please—

Mr. Margolis: Going to object to any reading of the contents of the document, your Honor, unless the proper foundation is laid.

The Court: How is it material?

Mr. Berger: To show, your Honor, there were two judgments recovered against Mr. Loudolph.

The Court: Against him personally or the corporation?

Mr. Berger: The corporation. With reference to this franchise to test as to whether or not the franchises were proper and legal, which is for the purpose of setting forth, the purpose for this is one of our defenses—it isn't in any way anticipating a defense, except we must put this in to show, if the Court please, that the franchises, in and of themselves were practically of no value, and if that is the case it may be that the men who actually paid the money, whom they collected the money from, may have a claim against us for the refund of the money, because they weren't entitled

(Testimony of Paul Loudolph.)

to the bankruptcy, may not have been entitled to it. [41]

The Court: Well, he wouldn't have a claim directly against you.

Mr. Berger: No—yes, he could, because you might say in the nature of a gratuitous payee, or payment under mistake and he could be and once they collected under the execution and attachment against the corporation, and if he didn't owe the corporation any money, obviously he shouldn't pay it, and that is the purpose of the preliminary questions I am going into now, your Honor.

Mr. Margolis: May I be heard, your Honor, unless your Honor desires a question.

The Court: No.

Mr. Margolis: Object to any examination in connection with this document in that we don't wish to know all that went on before, but we object to it on the ground it is incompetent, irrevelant and immaterial. The fact that the parties who paid over any monies to sheriff pursuant to the attachment and execution may have a claim against the bankrupt corporation is not an issue here. Certainly that creditor who paid the sheriff can in no wise go after the creditor in this action, that is the Norberg—

The Court: No, if we assumed that that person shouldn't have paid it over—

Mr. Berger: May not have even owed it to the bankrupts.

The Court: Then it goes in the hands of the trustees in [42] bankruptcy here and whoever is

(Testimony of Paul Loudolph.)

entitled to it, he or anyone else, can come and get it, but the point is this: If they are not entitled to it it ought to go back to the trustee and officers of the Court subject to the—

Mr. Berger: Furthermore, if the Court please, this is a direct contradiction to the questions, the previous question when I asked him whether there were any other claims or any other adjudications, and he said no suits filed against him, no judgments.

The Court: Well, you may ask that on a question of credibility.

Mr. Berger: Thank you, your Honor. If the Court please, at this time—do you have another copy of it?

Mr. Margolis: One will be available.

Mr. Berger: I would like to introduce it in evidence.

Mr. Margolis: I have no objection to it going into evidence, quite the contrary. This is a notice?

Mr. Berger: Yes.

Mr. Margolis: It seems to me that the original petition and the order should also be introduced into evidence so that the Court will know what was in back of it. The notice is prepared, as the Court well knows, from the prayer of the petition.

The Court: Certainly.

Mr. Margolis: There were four settlements made with some [43] of the so-called accounts receivable and debtors who had executed notes in favor of the corporation, which notes were placed with the Pacific National Bank and I think if the notice is

(Testimony of Paul Loudolph.)

going to be introduced, I think we should have sent over by the Clerk of Judge Wyman's court the original petition.

Mr. Berger: I will stipulate it may go in.

The Court: Let the whole thing go in.

Mr. Berger: Yes, your Honor.

The Court: Can be furnished later.

Mr. Berger: Thank you, your Honor.

Q. (By Mr. Berger): Mr. Loudolph, calling your attention to this notice of the bankruptcy court dated May 31, 1950, setting forth a judgment was recovered against the corporation in Superior Court of San Mateo County for the sum of \$1523.32, and \$11 cost; do you remember that?

The Court: When is the date, sir?

Mr. Berger: It doesn't say here, that is what I wanted to ask him, when and where it occurred, just reading from this notice.

Mr. Margolis: That is the reason I suggested in order the Court have all the facts, to produce and offer in evidence—

The Court: You can ask this witness if a judgment was obtained against his corporation.

Mr. Berger: That is what I wanted to know, if he knew whether— [44]

Mr. Margolis: If he knows.

Q. (By Mr. Berger): Do you remember that judgment, Mr. Loudolph?

The Court: What judgment is that?

Mr. Berger: The judgment in favor of Bernsten and Bernsten, Andrew and Loretta, plaintiffs.

(Testimony of Paul Loudolph.)

A. That happened—I lost control of the corporation.

The Court: I think it would be material to show knowledge if a judgment was obtained, had common knowledge, these people would know.

Mr. Berger: Credibility, your Honor.

Mr. Margolis: If he knew an officer could have been served, your Honor. There is no foundation.

The Court: Not talking about his knowledge, I am talking about the judgment is of common knowledge.

Mr. Berger: It is a matter of record.

The Court: I think it is rather helpful to your case.

Mr. Margolis: We have no objection, unless that is the reason—

The Court: You have no objection—I will let him ask the question.

Mr. Berger: Very well.

Q. Do you remember that judgment, Mr. Loudolph? A. No, sir, I do not.

Q. You did not remember that at all?

A. I know Bernsten and know the men and people in the cases. [45]

Q. And you had an accounts receivable in the amount of \$1271, is that correct?

A. I would say close to that.

Q. Close to that, but you don't have any recollection of that judgment at all?

A. What is the date, may be—

Q. I don't know.

(Testimony of Paul Loudolph.)

A. Out of control—I don't think when I was in control I didn't have that. I am sure we didn't.

Q. Do you know of another judgment against you, Mr. Loudolph, in favor of Raymond S. Hayden?

Mr. Margolis: So the record will be straight who does that notice, Mr. Berger, recite a judgment against?

Mr. Berger: I said the Brick O'Gold, I didn't say Mr. Loudolph.

The Court: The corporation?

Mr. Berger: Yes.

Q. Do you know another judgment against the Brick O'Gold, Mr. Loudolph, in favor of Raymond S. Hayden and Lyle V. Hayden, for the sum of \$1449 in the San Mateo County Superior Court?

A. No, sir.

Q. Action 50221? A. No, sir.

Q. You don't remember that at all?

A. Those must have been actions after the trustee took charge. [46]

Q. Do you know those people?

A. Yes, sir.

Q. Do they have franchises? A. Yes, sir.

Q. And do you know whether or not they sued on those franchises?

A. I had a discussion with their attorney at one time.

Q. When?

A. Oh, just very close to the time when we—probably in September or October.

(Testimony of Paul Loudolph.)

Q. Before or after the Norberg transaction?

A. After.

Q. How long after?

A. I would judge three weeks.

Q. And what was the discussion about?

A. They wanted us to release them from their franchise, the contract, and we had a chat with their attorney, two of them came up and we didn't think we should, or we didn't have the power to do it.

Q. And then you don't know whether they filed suit on that?

A. Must have been later, didn't file on me to the best of my knowledge.

Q. How about the Bernsten case?

A. Bernsten and Hayden worked together on that.

Q. Same thing? [47] A. Yes.

Q. Now, one more question and I may have to repeat myself, your Honor, with your Honor's permission, I asked awhile ago, Mr. Loudolph, with reference to the amount of monies due or paid by you to the corporation for the stock. Did your financial statement show that? A. Yes, sir.

Q. And did your financial statement show whether or not you owe any more money as an individual to the corporation?

A. The financial statement showed I did owe, oh, seven or eight hundred dollars.

Q. Seven or eight hundred dollars, and did you pay it? A. No, sir.

Q. You still owe that to the corporation?

(Testimony of Paul Loudolph.)

A. Yes, sir.

Q. Was that listed as part of the assets in the list, in the claim? A. I don't know, sir.

Q. Would you mind looking for it?

A. Says here \$554.06 I owe.

Q. Did you pay it? A. No, sir.

Q. \$554.06.

A. That amount that shows on the books.

Q. Is that all that you owe? [48] A. Yes.

Q. And what is that for, for the stock or other obligations? A. It wasn't for the stock.

Q. Was it for a withdrawal that you overdrew?

A. No, sir, no, sir, a payment to the Pacific National Bank so that my \$15,000 would be free and clear to put into the corporation.

Q. I asked you about stock, not about other obligations. I asked you whether or not there was some more money due by you for the stock, and you said yes, seven or eight hundred dollars. Now, is that listed in there? A. Yes, it is listed.

Q. Will you show in here—\$554, is that for the stock? A. That was the withdrawal.

Q. I want to know is the stock, the balance due by you for the stock? A. Nothing.

Q. Now, awhile ago, Mr. Loudolph—I may be wrong, will you please correct me—awhile ago I asked you whether or not there was any more money due by you for the stock and if the financial statement showed there was more money due by you as an individual to the corporation for the

(Testimony of Paul Loudolph.)

stock to be issued and you said yes, there was. Now, please show me that.

The Court: I think I understand it. You bought a certain amount of stuff? [49]

The Witness: Yes, sir.

The Court: You didn't have quite enough money to pay for it and you got the money from the Bank and the corporation had to furnish some five or six hundred dollars, is that correct?

The Witness: Actually what happened was that I sold my trucking business and the owners of Marin Dell, Bordens & Samarkand, and they gave me notes for \$5000 each, payable about a year hence. I had another little obligation with the Pacific National Bank, about \$556 in this figure. The bank then took the notes from these three gentlemen and in order—before I went down to talk to them about getting the \$15,000 with these notes as security, I had the corporation pay off the old indebtedness and they gave me the \$15,000 and I put it in to the corporation along with the automobile.

Q. Yes. Any other cash—I asked any other cash due, any more cash due by you besides that \$15,000, according to your financial statement?

A. No, cash and automobile I put in and then the corporation subsequently paid off the balance I owed on the automobile, made that \$800 more than the \$15,000.

Q. Then you overpaid about \$800 to the corporation, did you?

(Testimony of Paul Loudolph.)

A. No, sir, it is the amount of money that I put in, \$15,700, something like that.

Mr. Berger: That is all, your Honor.

Mr. Margolis: I might be of some assistance to counsel, [50] your Honor, if he will stipulate with respect to these petitions and the orders. I find a stamped copy of each of the petitions described in the notice that has been offered here.

The Court: You mean the judgments?

Mr. Margolis: No, before the referee in bankruptcy with respect to that notice, counsel was reading from, these petitions to compromise, and I also find certified copies of each of the orders in each instance signed by the referee. Now, I will exhibit them to counsel here. I have no objection, they may become a part of this record and introduced if counsel doesn't desire, I will introduce them so the court will know the entire situation with respect to the settlement of these four matters, only three of which, I believe, counsel referred to.

Mr. Berger: This doesn't state the date of the judgment, your Honor. That is what I wanted to find out, the one I am looking over, hurriedly.

The Court: Well, what is the purport? Isn't it to show that the corporation was in worse condition?

Mr. Berger: No, the purport is, your Honor, the purpose of my first bringing up that point was to show, as I explained before, it may be possible that the corporation never was even entitled to that money. Second, to discredit this witness with refer-

(Testimony of Paul Loudolph.)

ence to going to his credibility, with reference to the judgment, your Honor.

Mr. Margolis: Now, I notice, if I may answer counsel, your [51] Honor, in two instances here, one referring to the matter described in the notice with regard to the petition of compromise it made with the Haydens this language: "That on or about January 13, 1950, said purchasers, as plaintiffs, recovered judgment against bankrupt, as defendant," meaning Brick O'Gold.

The Court: That is after the bankruptcy.

Mr. Margolis: That is correct and if your Honor will take my statement, I sat in on all of the conferences and in order not to—when we had sufficient time to make application to vacate and set aside the judgment within the six month period, one of the considerations for our not doing so is recited here and in the statement made to the referee in open Court, against which we took certain small sums in settlement, because that is all we could get.

Mr. Berger: The purpose, as I said before—

Mr. Margolis: Also in the Andrew Bernsten and Loretta Bernsten the date of the judgment is there referred to in the petition, the petition which I prepared.

Mr. Berger: What is the date?

Mr. Margolis: On or about January 13, similarly, 1950, judgment, after bankruptcy, going in and vacating and setting aside, not to burden the estate with that expense, and upon investigation—

The Court: I don't think a judgment obtained after bankruptcy would have any materiality. [52]

(Testimony of Paul Loudolph.)

Mr. Berger: I don't know when the actions were filed.

The Court: He says he does not know anything about it.

Mr. Berger: I wanted to disprove—

The Court: If they were filed and he was served before that time it will affect his credibility.

Mr. Berger: Will have to check with the clerk's office in San Mateo County.

The Court: If you introduce details later on that, I will hear it.

Mr. Berger: All right, I will look for that.

Mr. Margolis: And to complete it with respect to the Stephens matter the judgment was entered on November 14, 1949, and I sat in on conferences in connection with the matter and a very fine settlement was made, I think, to everyone concerned. We offer these as our exhibits.

Mr. Berger: I have no objection, Your Honor, with the exception I would like, if I need time, to ascertain the dates of the filing of the actions.

The Court: I will allow them if you gentlemen want them.

Mr. Berger: I only brought it out for one purpose, and it mainly was for credibility, and—

Mr. Margolis: It is immaterial and we will object to cluttering of the record on that ground, Your Honor. It is immaterial.

The Court: Mark them for identification. If there is other [53] testimony, I will admit them.

The Clerk: Exhibits 1, 2, 3 and 4 introduced for identification.

(Testimony of Paul Loudolph.)

(Whereupon the documents entitled "Trustee's Petition for Order authorizing compromise of controversy, and giving notice thereof to creditors" in the case of Kenneth Johnson; John H. Stephens and Mildred Stephens, his wife; Andrew Bernsten and Loretta M. Bernsten, his wife; and Raymond S. Hayden and Lyle V. Hayden, were marked respectively plaintiff's exhibits 1, 2, 3 and 4 for identification.)

Mr. Berger: That is all for this witness.

#### Redirect Examination

By Mr. Margolis:

Q. You mentioned something to Mr. Berger about the corporation going on a cash basis about August of 1949? A. Yes, sir.

Q. In your discussions with Mr. Norberg did you advise him of that fact?

A. Yes, sir, we were on a cash basis.

Q. And where did you advise him of that, in the Lakeside Store? A. In a conference there.

Q. In a conference there. Was the same matters discussed in a conference had in the other attorney's office, do you recall? A. Yes, sir.

Mr. Margolis: I have no further questions. [54]

Mr. Berger: No further questions.

The Court: That is all, you may step down.

(Witness excused.)

Mr. Margolis: Call Miss Lee, Your Honor, as our next witness.

Mr. Berger: May I interrupt, counsel? I subpoenaed this Mr. Kolb. He has to go back immediately. With Your Honor's permission I would like to put him on, if counsel doesn't object.

The Court: Have you any objection?

Mr. Margolis: I have none.

The Court: Let Mr. Kolb go on.

### THEODORE A. KOLB

called as witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your name to the court, please?

A. Theodore A. Kolb.

### Direct Examination

Mr. Berger: And what is your profession?

A. Attorney at law.

Q. In San Francisco?

A. In San Francisco.

Q. And do you know Mr. Norberg, do you?

A. I do. [55]

Q. And do you know Mr. Loudolph, who was just on the witness stand? A. I do.

Q. You have met him? A. Yes, I have.

Q. When was the first time you ever talked to him or met him, Mr. Kolb?

A. Around July, 1949.

Q. And where was that?

(Testimony of Theodore A. Kolb.)

A. We had several contacts by mail. I might preface that our office represented Pacific Electrical and Mechanical Co., Inc., who were a creditor of Brick O'Gold corporation for certain mechanical and electrical work done and the installation and construction of stores. There was a considerable amount owing, and our clients asked us to get in touch with Brick O'Gold corporation to find out what can be done in the matter. On May 31—

Q. What year?

A. 1949, they received a letter from Mr. Loudolph as President of the Brick O'Gold corporation.

Q. Do you have that letter here?

A. I have this letter on—

Mr. Margolis: May I see that, please?

Mr. Berger: Counsel, will you stipulate that is the signature of Mr. Loudolph of the Brick [56] O'Gold?

Mr. Margolis: If you will allow me to compare.

Mr. Berger: Well, ask him, he is right there.

Mr. Margolis: The President acknowledges that that is his signature, Your Honor.

Mr. Berger: I will introduce that, if Your Honor please, as defendant's exhibit 1, and then you may read it.

The Clerk: Defendant's Exhibit A.

Mr. Berger: A, rather; always used to the plaintiffs.

Mr. Margolis: Object to that going in evidence,

(Testimony of Theodore A. Kolb.)

no proper foundation has been laid, Your Honor, for the introduction of the letter in evidence.

Mr. Berger: Already been admitted, your Honor.

The Court: Well, it is a letter from the President of the corporation?

Mr. Margolis: That is right.

Mr. Berger: That is right.

The Court: It may be—until I see it, I can't tell whether it is material. It may be simply a Christmas greeting for all I know.

Mr. Berger: Or passing the time of day.

Mr. Margolis: Not in connection with the affairs of the business, Your Honor.

The Court: Well, just the president of the corporation beginning to get into trouble.

Mr. Margolis: Very well. [57]

Mr. Berger: When did you get that letter, Mr. Kolb?

A. It was transmitted to our office by our clients on June 1st, 1949, in a letter wherein they took the position they would be willing to take a note if the same were secured. I contacted Mr. Loudolph by letter, the Brick O'Gold corporation to Mr. Loudolph's attention, and suggested that the notes be secured. I didn't receive a reply to that letter so I sent a follow-up letter to Mr. Loudolph on June 27, 1949, enclosing a copy of our trial letter which we received a reply by Mr. Loudolph on July 2, wherein he stated—

Mr. Margolis: Just a moment.

(Testimony of Theodore A. Kolb.)

Mr. Berger: Just a moment, may I see that letter?

Mr. Margolis: I would like to see the correspondence that counsel has referred to, this is in reply to.

Mr. Berger: Fine, let them all go in together.

Mr. Margolis: Could I have them back after the case is decided?

Mr. Berger: May we, with the Court's permission, after the decision?

The Court: After a decision, if there is no objection by counsel, I will release the exhibits.

Mr. Berger: Thank you. I don't think there will be anything pertaining to your particular issue.

The Court: Off the record.

(Off the record discussion.) [58]

Mr. Margolis: May I inquire what we are going to do with the documents that counsel now exhibited to me?

Mr. Berger: I want to introduce those also in evidence.

Mr. Margolis: You mean all of them?

Mr. Berger: That is correct.

Mr. Margolis: The carbon copies dated July 27, 1949, and June 22, 1949, addressed to Brick O'Gold Corporation, sent by the witness to the corporation, as well as the original letter of July 2, 1949, on the stationery of Brick O'Gold.

Mr. Berger: Introduced as one exhibit, Your Honor.

The Court: Very well.

(Testimony of Theodore A. Kolb.)

Mr. Berger: So stamped Exhibit B.

The Court: Defendant's exhibit B introduced and filed in evidence.

(The documents above referred to were thereupon marked Defendant's exhibit B in evidence.)

Mr. Berger: Your Honor would like to see these first?

Q. Now, Mr. Kolb, you stated that you received an answer back from Mr. Loudolf of the Brick O'Gold, as president of Brick O'Gold, on June 17, 1949?

A. In this answer Mr. Loudolf in sum and substance stated that he was in a bind for cash at the time, but that—using this paraphrasing here, the bright side of the picture is that in spite of the poor spring and summer weather experienced so far, our business is showing large gains each month and the [59] future looks very bright. That was on July 2.

Q. Did you have any more correspondence with him at that time?

A. Whereupon I took the matter up with our clients.

Mr. Margolis: May I interrupt at this moment, Your Honor? I think it is only fair that the contents of the letter of July 2, if it is going to be read into the record, in order to know what they are, should be prefaced by reading the entire letter.

(Testimony of Theodore A. Kolb.)

The Court: I thought the letters were introduced.

Mr. Margolis: I object to just reading a mere paragraph.

The Court: I have read them.

Mr. Margolis: I didn't know whether these were presented.

Mr. Berger: As far as I am concerned you can read the entire contents of all the copies.

Q. Go ahead, Mr. Kolb.

A. Well, after that we took the matter up and, in a conference with our clients, and they made an independent check on the credit of Mr. Loudolf personally and they felt that before they entered into an unsecured promissory note they wanted the signature of the other two officers on the promissory note, to wit, Dr. Etta Lee and Miss Nellie Lee, and we communicated that in a letter of July 12, 1949, to the Brick O'Gold Corporation, to the attention of Mr. Loudolph.

Q. And then what happened?

A. We didn't hear from Mr. Loudolf in response to that letter. [60] We stated in the letter that unless we heard from them, to make some sort of an arrangement between that date and the 18th of July we were instructed by our clients to begin litigation against Brick O'Gold Corporation.

Mr. Margolis: Pardon the interruption; was that introduced, or is it another letter you are reading from now? A. That is correct, July 12.

(Testimony of Theodore A. Kolb.)

Mr. Margolis: It seems to me, Your Honor, that this should be introduced.

Mr. Berger: I will introduce that, if Your Honor please.

The Court: All right.

Q. (By Mr. Berger): Go ahead, Mr. Kolb.

A. I didn't hear from Mr. Loudolf by the 18th and I waited another week and then filed suit against the Brick O'Gold Corporation on behalf of the Pacific Electrical and Mechanical [61] Company.

Q. When was that?

A. I just checked the complaint; it is July 25.

Q. Of 1949? A. 1949.

The Court: Defense exhibit C admitted and filed in evidence.

(Whereupon the document referred to was received in evidence as Defendant's Exhibit C.)

Q. Was he served; do you have records on that?

A. Verified on July 25 and filed on August 2, 1949.

Q. Do you know when Mr. Loudolf was served; have you any record of service on him?

A. I haven't got the record with me. To the best of my recollection Mr. Loudolf wasn't served, Dr. Lee.

Q. A member of the corporation?

A. An officer of the corporation.

(Testimony of Theodore A. Kolb.)

Q. Do you know about when she was served, roughly?

A. I would say within the next few days, a few days after filing of the complaint.

Q. In July some time? A. In August.

Q. In August.

The Court: Early August?

The Witness: Early, about the first week in August.

Q. O.K., go ahead. [62]

A. Right after she was served Mr. Loudolf contacted me.

Q. Did he discuss anything about the suit?

A. He came to my office with a financial statement.

Q. Did he mention anything at all about this suit? A. Oh, yes, he was familiar—

Q. What did he say?

A. He stated he realized we had filed a suit and he is in a bind right presently, that he is perfectly solvent and just one of these bad conditions where there was a bad—cold summer, and they didn't have the anticipated sales that they had hoped for, and he asked whether we could work something, work it out in some sort of fashion that we could extend him some time and hold off the proceedings with the suit until they could get over their temporary bind, according to him at that time was strictly seasonal. I said I don't have—I would have, if I remember correctly now, in substance I told him that I would have to see something more than just his statement

(Testimony of Theodore A. Kolb.)

to represent to my clients that would assist me in that way, their credit committee before I could suggest to them to hold off and he came back and I observed he had a financial statement, he said he had a financial statement. I said, well, I would like to see it, and he left my office that day and came back in the afternoon, said he went to his accountants and he came back with a mimeographed financial statement consisting of several pages. [63]

Q. Do you remember the date of that, Mr. Kolb?

A. I wouldn't like to swear to it, Mr. Berger. It was some time, either July—June or July.

Q. That is all right. That is close enough.

A. It was within a few days, relative a few months, I asked him whether the situation has changed since the time of the financial statement and he definitely, he assured me it had not, still the same condition; it is simply a seasonal situation like any other business, occasionally gets themselves in a bind for cash, but they are absolutely liquid because their assets far exceed their liabilities and that the condition as he set forth in the letter of July 2—I think it is July 2—the last letter he wrote, still the same, but just the fact due to the cold summer at that time and they are selling ice cream. I said I wanted to take the matter up with our clients, whatever their credit committee decided was satisfactory with us to do whatever they wanted us to. I passed the information on to them and they had it under advisement, and just about that time Mr. Norberg contacted us.

(Testimony of Theodore A. Kolb.)

Q. Now, before that, coming back to the first meeting you had in your office, who was present at that time? A. Just Mr. Loudolf.

Q. And you?

A. That is right, in my office.

Q. Did he give you a financial statement at that time? [64]

Mr. Margolis: Just a moment, may I have the date? Or approximate date?

A. The first week in August, Mr. Margolis.

Mr. Margolis: I see.

Q. (By Mr. Berger): And did—

A. Might be the second.

Mr. Margolis: Excuse me, get my mind straight on this.

The Court: After the suit had been—

The Witness: After suit was filed.

Mr. Margolis: The suit, you said, was filed in July?

The Witness: August 2, I checked on the complaint, verified July 25, filed August 2.

Mr. Margolis: Sorry for the interruption, Mr. Berger.

Q. (By Mr. Berger): At that time, when he came in the first time, did he have a financial statement with him?

A. Didn't have it with him. I told him I wanted to see a financial statement before, see, some form of authenticated statement and before I could talk to my clients and tell them that they ought to hold off in prosecuting the suit against the corporation.

(Testimony of Theodore A. Kolb.)

Q. Did he tell you as to his—did he go into at great length on the financial statement?

Mr. Margolis: That is objected to as leading. This is counsel's own witness.

Mr. Berger: Reframe the question. [65]

The Court: Reframe the question.

Q. (By Mr. Berger): Mr. Kolb, can you tell me whether or not any—can you tell me whether or not his financial statement was gone into at great length?

Mr. Margolis: Object on the same grounds heretofore urged, Your Honor; this witness is counsel's own.

The Court: Tell me whether you discussed his financial condition.

The Witness: I looked through the financial statement; I had several questions on it.

Q. Pardon me, before the financial statement—when he came in without the financial statement.

Q. He came in the morning without the financial statement and came back right, a couple of hours with it.

Q. Did he go into at any length as to his financial condition?

A. Well, he stated—it has been some time now.

Q. I appreciate it is hard to remember.

A. As I remember, he simply—we discussed with him and he said they were in a temporary bind due to that weather condition, that they were in good financial condition and that they were solvent, just a question they hadn't gotten any cash to meet their

(Testimony of Theodore A. Kolb.)

obligations and said there were certain deals pending, talked in generalities without actual figures, and I said, "Before going into this and before I can make any recommendations, pass any information on, I know the creditors, [66] the credit committee of the Pacific Electric and Mechanical Company would insist on some cold figures where they can see what is going on.

Q. Came back that afternoon?

A. Went out and came back that afternoon with a mimeographed sheet purportedly prepared by a certified public accountant.

Q. Did you go over that sheet at all with him?

A. I asked him several questions that came to mind as I went over it.

Q. Do you remember what they were?

A. I couldn't tell you. I know this much, that he had some, I think some \$40,000, or more than that, in accounts receivable. I wanted to know the breakdown on that and he said, "Well, the books are open at any time you want to see them. I don't know the detail of them." He said, a lot of stores owed them money and still working that out and slow payments, after they get going. He generally expressed to me the system how he operated, as I was totally unfamiliar with it.

The Court: Had you transmitted that information to your client?

The Witness: That is right.

The Court: As a result did your client withdraw the suit?

(Testimony of Theodore A. Kolb.)

The Witness: No, our clients said they felt they wanted a promissory note to secure the obligation before—

The Court: Wanted the note secured? [67]

The Witness: Wanted it signed by the—endorsed by the other two officers of the corporation.

The Court: In other words, your clients wanted something better than what they had.

The Witness: That is correct, before they would withdraw their suit.

Q. (By Mr. Berger): Did you ask Mr. Loudolf whether or not they were, he was in a bankrupt condition or whether he was insolvent?

A. I asked him that—

Mr. Margolis: Incompetent, irrelevant and immaterial, and leading and suggestive. This witness is the defendant's witness and both attorneys—

Mr. Berger: I asked him—

The Court: The water is over the dam, so to speak. Mr. Kolb described it—

Q. (By Mr. Berger): Will you please, as best you can, Mr. Kolb, relate what was said in regard to insolvency?

A. Well, I checked further into the statement of Mr. Loudolf and had made to him the request of our clients to get the note secured by the other two officers, and right about that time Miss Lee came in my office. She was an officer of the corporation.

Q. No, I asked you what you discussed?

A. Discussed the solvency of the [68] corporation.

(Testimony of Theodore A. Kolb.)

Q. What was said, that is what I wanted.

A. They both assured me at that stage, that was during August, that they were completely solvent. The only thing was that they couldn't get their collections in from their accounts as fast as they had anticipated due to this seasonal lag. Then the discussion came up they were going to get refinancing, going to get new blood so they can get some working capital. Apparently, they claimed that was their only trouble, that, plus the fact an accountant that they had sued them for \$5,000, which suit was completely unfounded and just tied them up in knots, tied up cash, he had attached some cash of theirs and that put them into quite a stress. I transmitted that information to the creditors committee, our creditors committee; our clients said they would insist on going ahead with the matter to judgment and they would hold off execution after judgment if satisfactory arrangements are made.

The Court: What do you mean by satisfactory arrangements?

The Witness: Payment of security.

The Court: Payment of security?

The Witness: Or his situation work itself out in such a way they could see their way clear of certainty of payment.

Q. Go ahead.

A. Especially keeping in mind it takes some time to obtain a judgment in the event that the discussions at that time would not culminate in satis-

(Testimony of Theodore A. Kolb.)

factory arrangements. So we [69] proceeded—as a matter of fact, I remember the attorney for Mr. Loudolf and Brick O'Gold Corporation stipulated to a judgment in the matter. He felt it was useless to enter an answer in the matter and a judgment was entered.

Mr. Margolis: I move what he felt be stricken, Your Honor.

The Court: Well, I will strike out what he felt. As a matter of fact, as a result of your conferences with your client you both allowed your account to ripen into a judgment?

The Witness: That is correct.

The Court: Not satisfied with the situation?

The Witness: Weren't satisfied, largely because Mr. Loudolf's slowness in answering communications and inability of getting a hold of him, and the fact he made appointments and didn't keep them quite frequently. Our clients felt they wanted to have something stronger than just Mr. Loudolf's word. He made promises and didn't keep them, however, whenever he did appear.

The Court: Isn't an unusual course, a debtor corporation trying to keep his head above water.

The Witness: It is the usual situation if you are short of cash.

The Court: You mean your clients weren't satisfied with the efforts and wanted either cash money, security, or a judgment, isn't that correct?

The Witness: That is correct. We weren't satisfied with [70] the efforts on the part of Mr. Loudolf,

(Testimony of Theodore A. Kolb.)

and our clients wanted Miss Lee in the picture and rather have her run the show than Mr. Loudolf, because from certain checks that they had made on the situation they weren't satisfied with Mr. Loudolf's management of the corporation, they wanted Miss Lee to take over and felt the only way to do that would be if Miss Lee was in active control of the business, not Mr. Loudolf.

Q. You mentioned that judgment was stipulated to?

A. That is correct, judgment stipulated to. When the attorney for Brick O'Gold assigned a stipulation and judgment entered upon the stipulation, he stated that he had no defense to the action and it was useless for him to enter an answer in the matter, so stipulated to judgment and judgment was entered.

Mr. Margolis: May I interrupt, please? Do you have the stipulation, sir, on the judgment? All of those matters become important, as I will demonstrate a little later, and like to get the chronology here, Your Honor.

The Witness: I haven't got a copy of the stipulation, it is in the file in Municipal Court.

Q. (By Mr. Margolis): Do you have a copy of the judgment, or do you have the date when judgment was entered? A. Judgment entered—

Q. (By Mr. Margolis): May I have that for the record, sir? A. September 21.

Q. You have a copy of the judgment there? [71]

A. I have a copy of the execution.

(Testimony of Theodore A. Kolb.)

Q. (By Mr. Margolis): May we have that, sir?

Mr. Margolis: Your Honor, forgive me for this interruption.

Mr. Berger: I think I can clarify this. I have a few more questions. It is twelve o'clock—a few more questions and I will be through. Counsel will want to cross-examine, no doubt.

The Court: Yes, I guess we will have to come back.

Mr. Margolis: I think that is my privilege, Your Honor.

The Court: Prefer stopping now rather than closing your examination? He has to come back anyway, might as well stop now.

Mr. Berger: Until what time, Your Honor?

The Court: Two is the usual time?

Mr. Berger: Yes, Your Honor.

Mr. Margolis: Yes. May the record disclose, Your Honor, I will keep this in my possession, or, rather, the clerk, keep the copy of the execution until we return at two o'clock?

The Court: Either one.

Mr. Margolis: Thank you.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [72]

Afternoon Session, August 1, 1950, at 2:00 o'Clock

Mr. Berger: Mr. Margolis, I understand you found a copy of the statement?

Mr. Margolis: Yes. Does Your Honor wish me to give the figures? During the noon hour, I ran totals.

(Testimony of Theodore A. Kolb.)

The Court: Have you run the total of that?

Mr. Margolis: Yes, subject to any little error. I went over the claims, divided them into three parts, Your Honor, two tax claims totaling \$527.55, six wage claims totaling \$3,666.08, one of which, Your Honor, is in the total sum of \$2,100 and obviously under an appropriate bankruptcy section, after established, the claim is good only, preferred to \$600, and the balance \$1,500 good as a general claim, and all the other claims which are in that file, \$29,849.39, subject to someone correcting the estimate I might have made in running them off.

In going through my file I find a carbon copy of, a mimeographed copy of the financial statement to which reference was made this morning and Mr. Loudolf, the president of the corporation, during the noon hour also went down to the Board of Trade office, Your Honor, and has the original work sheets, which we shall also present.

Direct Examination  
(Continued)

By Mr. Berger:

Q. Now, Mr. Kolb, prior to the noon hour [73] you made some reference to a financial statement. I show you a paper that was just handed me by counsel for the plaintiff and ask you is that the statement you had reference to?

A. Yes, that's the statement Mr. Loudolf handed me, consisting of four pages. It is mimeo-

(Testimony of Theodore A. Kolb.)

graphed, multigraphed, I would say, it was an exact copy, it looked, appears to be the same copy, one of those multigraph copies of the statement.

Q. Now, when was the first time you ever saw that statement?

A. The first time after Mr. Loudolf came in my office for the first time and he came back and brought this statement when I requested it.

Mr. Margolis: May we have that date, Your Honor?

Mr. Berger: Already testified he came that same morning, came back that same—

Mr. Margolis: I think the date is important.

The Court: Do you know the date?

Q. (By Mr. Berger): Roughly.

A. Well, it was, it was after we commenced suit on August 2.

The Court: I think you said the first week in August.

The Witness: The first week in August, right after Mrs. Lee, Dr. Lee, one of the officers of the corporation, was served, if I remember correctly.

Q. (By Mr. Berger): And did you have a discussion with him about that statement?

A. Yes, I went briefly over the statement. [74]

Q. Will you relate what was said, what you said and what he said?

A. Mr. Loudolf was complaining very bitterly about this \$5,000 suit and attachment where an accountant, who had worked for him, had attached

(Testimony of Theodore A. Kolb.)

all his assets, and he said that this voided him of any working capital.

And he said if he is being pressed by his creditors he wouldn't know what to do. He was very anxious to get this, the refinancing that he had a prospect at the time that would refinance it, that would come in with new capital into the business to give him some working capital. He said he had also pending an application with the RFC, too, in order to obtain additional financing, and I suggested to him—now thinking back—I made the suggestion to him that he might go into a reorganization under chapter 10, chapter 11 of the Bankruptcy Statute in order to hold off the foreclosure of these, these pressing bills, and he said no, he can't do that, "because I am solvent," and he said, "Here's the statement, this is the financial statement; I am solvent." And I asked him, "Well, how about these notes receivable, accounts receivable, which amount to substantial figures, \$16,000 in notes receivable and \$20,000 in accounts receivable." And he stated those were from various stores that he had sold, these stores, these various stores on a franchise deal and they were to be paid back and due to the bad weather, bad summer, if he [75] would go after the stores and press them for it it would put them out of business, said it would be about 90 days until he gets the money into those.

I looked over these things—I do remember now I questioned him about one item, trying to find it here. "Due from officers, \$1,302"—starts out May

(Testimony of Theodore A. Kolb.)

1, \$554.06; on June 30, it is \$1,132.81; and on July 31, it is \$1,302.81. In other words, increased here.

An item labeled "Due from officers," and he gave me this explanation: When he purchased his own stock for \$15,000 he took a loan on the Pacific National Bank and that the corporation has been paying the interest on that note and that this item right here represents the interest which he was paying on the note, that \$15,000 which he purchased stocks, these monies due from him. It was rather difficult to get anything out of Mr. Loudolf; he was extremely evasive about anything. I tried to pin him down. Frankly, I wanted—on checking, Mr. Loudolf relied primarily on Miss Lee, because she seemed to be more capable, more reliable, and if she said, "I will be there and I will have certain information," she came through with it and he never did.

But it finally culminated that we told Mr. Loudolf we had to have certain financial information in order to give him any further extensions on it by a certain date, otherwise we must consider that he is not going to proceed in accordance [76] with his prior promises that he will work out and have to seek our remedy by execution.

Well, the date came and Mr.—I think it was the end of September—Mr. Loudolf did not come through, did not keep his appointments he had made, and we proceeded to instruct the sheriff to execute on the assets of the corporation.

Mr. Margolis: Your Honor, I am going to object

(Testimony of Theodore A. Kolb.)

to that on the ground it is indefinite, uncertain. If they proceeded to instruct the sheriff to execute, I think we should have the document, some information setting the date, showing the instructions. I think that is important in the proper chronology of this case.

The Court: I don't think the testimony is objectionable. As a matter of fact, I think his testimony is very helpful to you.

Mr. Margolis: Very well.

The Court: Not at all satisfied with the condition of the business and they were pressing.

Mr. Margolis: I will withdraw the objection, Your Honor.

The Witness: I did check with the attorney for one of the largest creditors as I felt that he would have the largest interest in that. I checked with Mr. Connelly who represents Samarkand, who claims to be the largest creditor of Brick O' Gold.

Q. Did the statement show what his account [77] was?

A. Never did. Mr. Loudolf promised to give us a breakdown—this financial statement is just a summary—we wanted to look over the details where these accounts receivable were, if they were in existence.

Q. What happened to that Samarkand account?

A. Samarkand account was about \$15,000 and I checked with Mr. Connelly to find out whether they were in a position to inform me whether this was a solvent business or whether they were going

(Testimony of Theodore A. Kolb.)

to take steps towards enforcement of their account and I was informed by Mr. Connelly they were not going to take any steps, satisfied it was a solvent business and satisfied it would work out, it is a seasonal lag.

So then we wanted—the main thing we wanted, if Mr. Loudolf wouldn't give us a promissory note, we wanted to know what this item of accounts receivable, what it was, because, I stated, "It represented \$20,000, and according to your financial statement, which Mr. Loudolf assured me is still a valid financial condition of the business at the time when I was talking to him, it showed it was solvent, that the assets were in excess of the liabilities," and we wanted to see what these accounts receivable, whether valid, or a bookkeeping entry, and we never got this information from Mr. Loudolf.

Q. Did you ask him about it?

A. We asked him repeatedly.

Q. What did he say? [78]

A. Going to produce—as a matter of fact, I had also talked to Miss Lee about it and she said Mr. Loudolf had the books and have to depend on Mr. Loudolf to produce them.

Q. Did you ask him whether or not those were valid accounts?

A. He said they were valid accounts, but I wanted to know who they were; \$20,000 is a substantial amount of money, represents practically half of his business here and accounts receivable.

(Testimony of Theodore A. Kolb.)

He claimed that these accounts were the licensees, the franchise holders in these various stores and they were accounts that they had accumulated.

Just about that time Mr. Norberg contacted me and said he represented a creditor, that he had—

Mr. Margolis: May we have the date, please?

A. It was the latter part of September, Mr. Margolis. I think we instructed the sheriff to execute the 21st, 22nd of September, 22nd of September.

Q. (By Mr. Berger): Was that about that time? A. 1949.

Q. Did he contact you before or after that date?

A. Mr. Norberg?

Q. Yes.

A. Mr. Norberg contacted me before that, a few days.

Mr. Margolis: May we have that date?

A. The 22nd day of September, 1949, is when we instructed the sheriff to execute. [79]

Q. (By Mr. Berger): When did Mr. Norberg contact you?

A. Two or three days before that.

Q. All right, go ahead.

A. He stated to me that he represented a client and that he had filed a suit against—

Mr. Margolis: Going to have to object on the ground no proper foundation was laid.

The Court: All right.

Mr. Margolis: Persons present, time and place.

The Court: Sustain the objection.

(Testimony of Theodore A. Kolb.)

Q. (By Mr. Berger): Now, at the time when Mr. Norberg contacted you, you say about two or three days before the date of execution?

A. Yes, sir.

Q. And how did he contact you, by phone?

A. By telephone.

Q. And did you see him after that?

A. He asked for an appointment, whether he could see me, and he came up and saw me.

Q. And how long after that date did he see you after that appointment?

A. Well, it was within the space of two or three days, before the 22nd of September.

Q. When he came to see you at your office?

A. He did. [80]

Q. Who was there?

A. Mr. Norberg and myself.

Q. And anyone else?

A. Not at that time.

Q. What was said?

Mr. Margolis: Just a moment, we object to the question on the grounds it is incompetent, irrelevant and immaterial.

The Court: What is the question? As to the conversation?

Mr. Margolis: Yes.

The Court: I will exclude it.

Mr. Berger: O.K.

The Court: Tell the result of the conversation, what he did, if anything.

(Testimony of Theodore A. Kolb.)

Mr. Berger: Going to ask that in the next question.

Q. As a result of that conversation, Mr. Kolb, what occurred; what did you do?

A. I transmitted to my clients the information that Mr. Norberg gave me, that he had an account, that he intended to press against Brick O'Gold, and I was instructed by my clients unless they, by a certain date that we gave Mr. Loudolf to give us the breakdown on these accounts receivable, unless that information is received by me and transmitted to them, I was to proceed with instructions to the sheriff to execute against the property of the corporation.

Q. Now, when did you next see Mr. Loudolf or Mr. Norberg [81] after that time?

A. I think I saw him on the date of the execution, the 22nd of September.

Q. Who did you see?

A. I think I saw both Miss Lee and Mr. Norberg.

Q. And where?

A. He was out in Miss Lee's store.

Q. And what occurred, what was said?

A. Well, Miss Lee said they were still trying to get financing, that they had a party interested. She wouldn't give me the name of the party who was supposed to finance about \$15,000 or \$20,000, that they had still, I think, the RFC application pending; she was bitter about the whole thing, she said her whole life savings are depending on this thing,

(Testimony of Theodore A. Kolb.)

that she was waiting for information from Mr. Loudolf which he had not given to her, an officer of the corporation. So I told her so far as we were concerned we certainly did not feel we wanted to hamper any refinancing or jeopardize any chance of her staying in business, we were not going to press them if we are satisfied the statements made by Mr. Loudolf were correct.

Q. And was anything at that time said about the solvency or insolvency?

A. I was still informed that they were solvent, that they were just stretched, and because they didn't have any cash, operating cash, with the suit hanging over their heads—sure they [82] were solvent but they needed working capital, because they were working on a c.o.d. basis for lack of working capital, because all of their assets were tied up in promissory notes from various stores. And the next thing I knew about it was that I had read in the Recorder that an involuntary petition in bankruptcy had been filed. That is the last I did about it.

Q. Did you have any conversation with Mr. Norberg in the presence of Mr. Loudolf or Miss Lee?

A. I think one or two conversations, the time when we had a conference in Miss Lee's store on the 22nd. I know that date, because I know that was the date of the sheriff's execution and I have in front of me the sheriff's return verifying that day.

Q. Did you have any conversation at any time in your office with Mr. Norberg and Mr. Loudolf

(Testimony of Theodore A. Kolb.)

where there was brought into the conversation this financial statement?

A. I think it was after that 22nd Miss Lee said that she was going to bring Mr. Loudolf up to my office, we couldn't get a hold of him, she was going to bring him up to the office.

Q. Did she do that?

A. She did, I think, a day or two later.

Q. Who was there at that time?

A. Mr. Norberg was there, Mr. Loudolf was there, and Miss Lee.

Q. And you? [83]

A. And myself, in my office.

Q. What was the conversation about then?

A. They were going to let us know what these accounts were and the only thing that I remember in that conversation we were told they were still, that they had still had the RFC application pending and going to let us know, and I checked with Mr. LeMasters from the Pacific National Bank, and he confirmed there was an application pending and that no decision had been made by the RFC, but what they needed was working capital, that they appeared to be solvent. That is the banker's statement.

Mr. Margolis: I move that be stricken, may it please your Honor, on the grounds it is not binding on the plaintiff.

Q. (By Mr. Berger): Did this conversation take place during the time they were there, at the particular time?

(Testimony of Theodore A. Kolb.)

The Court: In their presence?

The Witness: Who?

The Court: The president.

A. I don't remember whether they were present or right after.

The Court: I will strike it out.

Q. (By Mr. Berger): Was that conversation during the time that they were there in that office or afterwards? A. I don't remember that.

Q. You don't remember. Was any statement made to you in the presence of Mr. Norberg with reference—withdraw that. Was [84] there any conversation or part of a conversation at that time in your office, any statement made by either Miss Lee or Mr. Loudolf with reference to—

Mr. Margolis: I object to the question, may it please your Honor, on the ground it is leading and suggestive.

Mr. Berger: I haven't finished my question yet, your Honor.

Mr. Margolis: That is the vice of it, I think, your Honor, observed that he might.

Mr. Berger: I will reframe the question.

The Court: Yes, reframe it.

Q. (By Mr. Berger): Mr. Kolb, at that time what was said, if you remember, to Mr. Norberg by either Loudolph or Miss Lee with reference to their solvency or insolvency?

Mr. Margolis: We object to the question again on the ground it is leading and suggestive.

The Court: I will allow that.

(Testimony of Theodore A. Kolb.)

Mr. Margolis: May I finish it this way? Some reference was made to conferences or a conversation with a Mr. LeMasters of the Pacific National Bank, and it is not clear in my mind—

The Court: I am not allowing what he said, I will what one of the officers said, Loudolf or Lee, either one of them said, you may testify to.

A. They both assured they were solvent at that conference. Again they needed refinancing in order to obtain working [85] capital until thy were able to collect on these accounts receivable and notes receivable from the various stores, that was a matter of—that would take until about January or February, and that was the statement they made in September, it would be January or February by the time they received these monies and they needed money because Samarkand was not going to extend any further credit and put them on a c.o.d. basis, that they were solvent, assured us of that, that the only thing they needed was working capital, and they said if they don't get working capital and these claims, their debts were being pressed, they might then find themselves at the end of the rope and not be able to operate.

The Court: Notwithstanding those assurances you didn't rely on them and went ahead and pressed your litigation?

The Witness: Your Honor, we had at that time, had already a judgment, we wanted—

The Court: Execution?

The Witness: We issued — that was already

(Testimony of Theodore A. Kolb.)

after we had issued execution that, since the conversation we issued execution, because we wanted Mr. Loudolf to tell us who those accounts receivable were and he didn't come in and refused to tell us who they were and give us the breakdown of it and—

The Court: Well, the execution is usually issued to obtain assets rather than to—answers to interrogatories.

The Witness: Well, the only reason we did proceed that [86] way is because we were satisfied that Mr. Loudolf wasn't going to cooperate and we felt as long as they were solvent, according to his assurances, and there were \$20,000 of assets, if he didn't want to press his debtors we were going to enforce payment of our claim from those debtors and we did, according to the sheriff's return, proceed and levy execution against these stores that he had and returns which I hold in my hand right here the handwriting of the debtor returned, that they held the money, as one, "We hold \$1,200 due Brick O'Gold; we hold the sum of \$534.39; we owe \$1,450 to Brick O'Gold, payable \$50 a month, and paid over to the sheriff of the County of San Mateo, \$33.46." In other words, we have the answers of the creditors—debtors which Mr. Loudolf claimed owed him the money to the sheriff that they do. And the sheriff proceeded with the execution. However, we could not have accomplished the same because the bankruptcy was filed, or when that office filed we were informed, we received notice of in-

(Testimony of Theodore A. Kolb.)

voluntary bankruptcy, we instructed the sheriff to do nothing further.

Q. (By Mr. Berger): Do you remember when you received that notice of the involuntary petition?

A. I saw it in the Recorder. I picked it up in the Recorder some time in the middle of November, called to my attention by one of my associates. He had seen it in the Recorder and I looked it up. It was in there. [87]

Q. One more question—a few more questions. Do you remember during any of those conversations in your office you mentioned something about the Samarkand Ice Cream holding off payment? Was there anything else said by Loudolf or Miss Lee with reference to the Samarkand Ice Cream and this corporation as to their doing business together?

A. Mr. Loudolf mentioned there was some deal pending. He was very vague in all his statements. He mentioned some deal pending where Samarkand was going to refinance Loudolf and take over his plant in Redwood City, which represented the major claim of our people, because they had wired all the machinery down in that plant, supposed to have been a very first rate ice cream plant, according to Mr. Loudolf at that time some deal was pending and negotiations were pending for Samarkand to take over that plant and operate it and pay and try to get a liquidation of their indebtedness

(Testimony of Theodore A. Kolb.)

through rental, or some arrangement that he was making with them.

Q. Mr. Loudolf told you that?

A. Mr. Loudolf told me that.

Q. Mr. Kolb, before you came in here this morning Mr. Loudolf was on the witness stand and he made a statement that you had the financial statement in your hand and you told Mr. Loudolf that with that statement you could get 75 cents on the dollar. Do you remember any such conversation?

A. I don't see how I could have made a statement like that, [88] because I couldn't look over his financial statement, that is a summary, and it shows that his assets exceed the liabilities, and I'm not a bankruptcy expert and I'm in—very rarely handle collection matters of that kind, so I am not familiar, sufficiently familiar to be able to foretell by looking at a financial statement how much percentage he would get on the dollar, and I don't believe I made a statement of that kind, especially in view of the fact that I had the assurance at that time, in letter form and in verbal conversation with Mr. Loudolf, that he was solvent, only in a temporary bind for working capital.

Mr. Berger: If your Honor please, I want to introduce this statement as defendant's next exhibit in order.

Mr. Margolis: We want to object to the introduction of that document on the ground it does not speak of the day of the attachment, but several

(Testimony of Theodore A. Kolb.)

months prior thereto, and under section 6 of the Bankruptcy Act the time of solvency or insolvency is determined from the moment that the attachment or a transfer is made, whether it be voluntary or involuntary.

The Court: Well, both sides have repeatedly referred to and relied upon the statement. I will admit it in evidence.

Mr. Berger: Not only that, Mr. Loudolf said there was no change of condition.

The Court: Admitted.

The Clerk: Defendant's Exhibit D admitted and filed in [89] evidence.

(Whereupon, the financial statement referred to was received in evidence and marked Defendant's Exhibit D.)

Mr. Berger: I think that is all, your Honor. Just a moment—

Q. Was there anything at any time said, Mr. Kolb, as to why, or any explanation given to you at any time as to why Mr. Loudolf was on a c.o.d. basis, as you mentioned, and he mentioned?

A. He said he didn't have any working capital, and an ice cream company, I think it was Samarkand, wouldn't extend any further credit.

Q. When was that conversation, about?

A. It was in the latter part of September.

Q. In the latter part of September, and did he tell you when he started on that c.o.d. basis?

A. No.

Q. You don't remember?

(Testimony of Theodore A. Kolb.)

Mr. Berger: That is all. You may cross-examine.

### Cross-Examination

By Mr. Margolis:

Q. Mr. Kolb, you testified that with certain levies of execution on the action you mentioned, you represented Pacific Electrical and Maintenance Company against the Brick O'Gold?

A. Pacific Electrical and Mechanical Company.

Q. Pacific Electrical and Mechanical Company. That was action No. 256298, commenced in San Francisco, is that correct? [90]

A. 256298, that's correct.

Q. Now, you told us that you had some conversations on September 22 in your office, or Mr. Loudolf's office?

A. Not in my office. The conversation with Mr. Loudolf present and Miss Lee present, is that the one you are referring to? I think that was the next day.

Q. September— A. 23.

Q. At that time you explained to them that you wanted to cooperate with them and do whatever was necessary to be done to permit them to lift themselves out of their dilemma? A. That is right.

Q. That was on September 23?

A. Because we didn't obtain any funds under the executions. I checked with the sheriff and—they were all on the properties that we executed on, there

(Testimony of Theodore A. Kolb.)

were two prior attachments, namely the Trumbull suit and the Norberg suit.

Q. Yes, you knew of the Trumbull suit, didn't you?

A. Mr. Loudolf told me about that the first day he came into my office and assigned that as the reason he was in the temporary bind because they attached all his liquid assets, as he stated that his accountant knew where his liquid assets were and he attached all his liquid assets that he had.

Q. You knew about the Trumbull suit?

A. Definitely. He told me about it himself the first time he [91] came in.

Q. Now, you say an associate of yours advised you of the involuntary petition in bankruptcy that had been filed. The record discloses that was filed on November 9, 1949.

A. I was—about the 15th—I didn't know about it until—as a matter of fact, I can fix that date.

Q. I would like you to fix that date. Perhaps I can help you by showing you your file 38302.

A. I can fix it on another basis. That would—it was a day after the sale in one of the stores down there. The sale was on the 14th of November so it was the 15th of November when I found out about it.

Q. You found out about it, and you went ahead with the sale after bankruptcy had intervened?

A. Nobody had informed us the bankruptcy had intervened. The sale was posted.

Q. You informed Mr. Loudolf and Miss Lee that

(Testimony of Theodore A. Kolb.)

you were willing to assist him after these executions were levied and they were returned unsatisfied?

A. If they were going to cooperate with our clients and give them the information which I felt they were entitled to know, if they were to extend credit.

Q. Yes. And you represented here certain returns here that you had received from the sheriff's office that these—advised by the sheriff they were made, is that correct? [92] A. Yes.

Q. Do you have the information with regard to the execution at the premises of 740 Laurel Street, San Carlos?

A. Do you know the owner of that property?

Q. I will ascertain it if that will assist you. It was either Mr. Peters or the Brick O'Gold Corporation.

A. Mr. Peters answered here and in his own handwriting, we owe a promissory note for \$1450, payable \$50 on the first of each month. This will be paid to J. J. McGrath, sheriff, San Mateo County, by writ of execution.

Q. I want to know what happened to the personal property on the premises?

Mr. Berger: I don't think that is within the issues, what happened to the personal property, some other premises, some other time, only interested in—

The Court: Pursued and how he attempted to enforce his remedies.

Mr. Berger: That is true, your Honor, but I

(Testimony of Theodore A. Kolb.)

think the fact is that he did enforce them. What happened after that goes beyond the issue.

The Court: In the nature of enforcing it.

Mr. Berger: Whatever your Honor says.

A. According to the return by the deputy sheriff on behalf of J. J. McGrath, property was sold at an auction sale after advertisement, advertising it at public auction, personal [93] property.

Q. What date was it sold?

A. One lot on the 29th of September, the other lot on the 14th of November.

Q. Who bought the lot on the 14th of November?

Mr. Berger: That is going far beyond the issues. The point was he pursued his remedy, that was sold and I don't think getting the name and address of the buyer, where he got his money, is going to—

The Court: I don't think that matters.

Mr. Berger: It is immaterial, I will object to that.

Mr. Margolis: If I may explain to your Honor, we have testimony on direct examination that as soon as this witness learned that an involuntary petition was filed he instructed the sheriff to cease any steps enforcing this obligation.

The Court: That is for the bankruptcy court.

Mr. Berger: Exactly.

The Court: If I were hearing the whole bankruptcy, I would delve into it, but all I am concerned with is one little section of the bankruptcy matter.

Mr. Berger: That is right.

(Testimony of Theodore A. Kolb.)

The Court: There may be an illegal operation, maybe money due from one to the other, but I have nothing to do with that.

Q. (By Mr. Margolis): Now, you were in constant communication, [94] were you not, with Mr. Norberg beginning at the time of the first visit made there in September, as you testified a little while ago?

A. I wouldn't say constant communication.

Q. Well, you conferred with him on numerous occasions in connection with these matters we speak of now?

A. Mr. Norberg handles all the collection matters for several of our clients.

Q. Yes.

A. And occasionally he contacts me with matters pertaining to collections where a legal issue is involved and asks my advice pertaining to that, because we don't handle collection work in our office.

Q. This matter was not assigned to him, your Pacific National Bank account?

A. Not at that time, because it was in litigation.

Q. Who handled that, yourself?

A. The litigation part our office handles.

Q. When he came in to confer with you in September did you tell him that you already had a judgment?

Mr. Berger: Just a moment, I don't think that is part of the issue; I will object.

The Court: I missed the last word, did you tell him you already had what?

(Testimony of Theodore A. Kolb.)

Mr. Margolis: Judgment.

A. No, I don't think I had the judgment, it was a couple of [95] days. I told him Mr. Gay, I think was the attorney for Brick O'Gold, had agreed to file a stipulation for judgment, but I don't think the first time I talked to Mr. Norberg the judgment had been entered yet.

Q. Did you tell us that the first time you talked to him was September 22, 1949?

A. No, I don't—the first time I talked to him was a couple of days before the judgment.

Q. A couple of days before the judgment. You said there was a conference in your office on September 22, 1949. A. That is correct.

Q. Present yourself?

A. No, not in my office, the 22nd, the 23rd, the evening of the 22nd—wait a minute, I think out in Miss Lee's store, because we were unsuccessful in obtaining, getting a hold of Mr. Loudolf, nobody knew where he was and—

The Court: The pertinent fact is where was it?

The Witness: Miss Lee's store out at Lakeside.

Q. On the evening of the 22nd or 23rd?

A. 22nd.

Q. Mr. Norberg was there at that time?

A. Yes, he was.

Q. Miss Lee was there?

A. That is correct.

Q. Was Mr. Loudolf there? [96] A. No.

Q. Did you tell Mr. Norberg at that time that

(Testimony of Theodore A. Kolb.)

you had a judgment entered on September 1, 1949?

A. I don't think I had it entered.

Q. I show you an execution you showed us this morning.

A. Does that show September 1?

Q. September 21.

A. 21. Yes, Mr. Norberg knew it, because that day the sheriff had executed against all those stores.

Q. Yes. And did he tell you he had filed a suit on— A. I knew—

Q. September 12?

A. I knew, I inquired—the way I got in touch with Mr. Norberg is the sheriff called me back and said when he made these largest of executions that Mr. Norberg's attachment and the Trumbull attachment were ahead of me. That is how I knew Mr. Norberg had a suit pending, but had only attachments on the properties and not executions.

Q. You kept your clients advised of the situation from time to time, did you not?

A. That is correct.

Q. You say that Mr. Loudolf was not cooperating or keeping in touch with you in connection with the payment of the claim which was due and owing to your client, the Pacific Electric and Mechanical Company? [97]

A. He made certain statements that he would present details of that financial statement and never did.

Q. He wrote you a letter on May 31, 1949, which is defendant's exhibit A? A. Yes.

(Testimony of Theodore A. Kolb.)

Q. Did he not? A. That is correct.

Q. In which he recited, among other things, that he was very unhappy about, "about our inability to meet your bill at this time but we have some problems that will solve themselves in the next 60 to 90 days"? A. That is correct.

Q. And then you wrote him a letter on June 27, 1949, in which you—withdraw that. You wrote first a letter on June 22, 1949? A. That's right.

Q. In which you advised him your clients had turned over to your attention the claim?

A. And we got no response to that letter.

Q. You got no response to the letter of June 22; you wrote him again on June 27?

A. That's right.

Q. And then in that letter you threatened suit if the bill was not paid? A. Yes. [98]

Q. And you got no response to the letter of June 22 which you hold in your hand, and you wrote again on June 27? A. Yes.

Q. And then—

A. We asked him to contact us on or before the 25th day of June. The reason time was pressing, as I remember, I am not positive of the dates, but I think there was a possibility of filing a mechanic's lien against the property down in Redwood City and that is the reason time was pressing at that time, but our clients forewent the filing of the mechanic's lien, enforcement of the mechanic's lien, it was filed but never did file an action to foreclose, because it

(Testimony of Theodore A. Kolb.)

would have embarrassed the contractor who was involved in the thing.

Q. You received the reply to the letters of the 27th and the 22nd, being defendant's exhibit B, dated July 22, 1949?

A. That is right. And then we wrote him another letter asking him to come and discuss it so we could get some facts, and that is when he came in and started giving promises and never keeping them.

Q. May I have that letter?

A. You have it in evidence.

Q. You say you wrote him another letter; you have reference to this letter of July 12, 1949?

A. That is in response to his letter of July 2.

Q. You say, "Unless the above is not completed on or before [99] the 18th day of July, 1949, suit will be commenced against Brick O'Gold Corporation."?

A. That is right, and he never did come in then until after we filed the suit. He never responded to that letter.

Q. You told your clients of the irresponsibility of Mr. Loudolf, did you not, with his not keeping his promises in coming to see you?

A. That is right.

Q. And notwithstanding that they asked you to give his personal guaranty to a promissory note?

Mr. Berger: Just a moment—

A. They were interested in the personal guaranty of Mrs. Lee.

The Court: What is the objection?

(Testimony of Theodore A. Kolb.)

Mr. Berger: I think it is argumentative.

The Court: It is cross-examination.

A. (Continuing): They weren't interested in Mr. Loudolf's financial guaranty under his financial statement, they were interested in Dr. Lee and Miss Lee. They knew they were responsible parties.

Mr. Margolis: I move the answer be stricken on the ground it isn't responsive and ask the reporter to read my question.

The Court: All right, strike it out.

Mr. Berger: I think the answer made was in answer to the question. I believe it should [100] stay in.

The Court: Well, gentlemen, I don't see—I have heard a great deal of testimony as to these parties not having much confidence in—as to Mr. Loudolf, and I don't see any use of testifying over and over again. He didn't answer letters and he didn't come in to see them. Doesn't particularly matter whether it is in or out.

Mr. Margolis: Very well, your Honor.

Q. The fact remains that your client, you, at your client's suggestion as contained in this letter requested the additional security by calling for the signature of Mr. Loudolf, Dr. Etta Lee and Miss Nellie Lee, as contained in your letter of July 12, 1949, defendant's exhibit C?

A. That is correct. It is standard procedure by the Pacific Electric and Mechanical Company.

Mr. Margolis: Move the standard procedure be stricken on the ground it isn't responsive.

Mr. Berger: I think it is responsive.

(Testimony of Theodore A. Kolb.)

The Court: Gentlemen, even I have finally apprehended there was dissatisfaction with the account and wanted either money or security.

Mr. Berger: Or someone's signature.

The Court: I don't see any use of going over it and over it and over it.

Q. (By Mr. Margolis): You advised your client, did you, of the pendency of the Trumbull suit? I don't know whether I [101] asked you that question.

A. I mentioned it to them after I found out about it.

Q. And did you also tell him what Mr. Loudolf and what Mrs. Lee informed you about the accounts receivable, namely, that because of the bad seasonal weather the pressing of those accounts receivable would have the effect of putting those franchise holders, or stockholders, out of business?

A. Yes, I talked to him, I discussed the matter very thoroughly with Mr. Farrel, who is the manager.

Q. And these conversations—

Mr. Berger: Are you finished?

A. (Continuing): Manager of Pacific Electric.

Q. (By Mr. Margolis): These conversations took place, you say, in September?

A. Right after the conversations with Mr. Loudolf and Miss Lee.

Q. And you know of your own knowledge that the season, the ice cream business in September is sort of off?

(Testimony of Theodore A. Kolb.)

Mr. Berger: Just a moment—

A. I don't know that on my own, except down on the Peninsula it gets pretty warm. When you have a pretty cold summer you do get a warm fall.

The Court: He doesn't know of his own knowledge.

Mr. Margolis: I have no further questions.

Mr. Berger: No further questions.

The Court: You may step down. [102]

The Witness: Thank you very much.

Mr. Berger: He may be excused with your Honor's permission?

The Court: Yes, Mr. Kolb is excused. You may proceed with the plaintiff's case.

Mr. Margolis: Miss Lee.

### NELLIE LEE

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Wlil you state your name to the Court, please? A. Nellie Lee.

### Direct Examination

By Mr. Margolis:

Q. Miss Lee, you are an officer of the corporation Brick O'Gold?

A. Yes, I was secretary.

Q. And were you secretary during the month of September and continuing thereafter until the bankruptcy proceedings were initiated?

A. Yes, I was.

(Testimony of Nellie Lee.)

Q. Do you know Mr. Norberg?

A. The first time I saw him——

Q. Do you know Mr. Norberg?

A. Well, I have met him a number of occasions.

Q. Can you tell us when you met him, the first occasion, approximately when, if you can give us the date, the month and [103] the year.

A. I would say some time in, probably the first part of September, as I remember.

Q. Of what year? A. 1949.

Q. And where did you meet him?

A. I was working at the Lakeside store at that time and he came out to see me there.

Q. Who was there at that time?

A. On the first occasion I was there alone.

The Court: Lakeside store is one of the franchise stores?

The Witness: That is right.

Q. (By Mr. Margolis): Who operated the Lakeside premises? A. I did.

Q. It was owned by yourself?

A. That is right. The first time he came in it was in the morning and I had just opened the store shortly, and he introduced himself and says that he was a collection agent and collecting money for one of the accounts Brick O'Gold Corporation owed money to. Asked if I was familiar with it and I said I was, and of course we discussed that. We had, the corporation had owed this money for quite some time and he was, wanted to collect on it, so we talked about the condition of the company, because

(Testimony of Nellie Lee.)

I all along, I was, since January until June or July, I had worked full time at the Brick O'Gold [104] office at Redwood City, which is the main office.

Q. I don't want to lead you off—if you will just tell the Court in answer to my questions, tell the Court what happened and in the presence of Mr. Norberg or any other witnesses—I might ask you what happened before that?

Mr. Berger: Your Honor please, I was going to make a motion to strike that out by reason of the fact no question whatsoever was asked with reference to a conversation, but nevertheless the witness proceeded to give a story. Bring that to Your Honor's attention.

The Court: So far the story hasn't been very helpful.

Mr. Berger: No, either way, just shows you the—

Mr. Margolis: I don't think—

The Court: Counsel will ask you questions, just answer those questions.

Q. (By Mr. Margolis): As a matter of fact, I interrupted the witness from making an answer to a question when I tried to lay the foundation, so it is unnecessary to take up the time of the Court. Now, were you familiar with the operations of the corporation and its business affairs? A. Yes.

Q. And you knew that the amount of this claim that Mr. Norberg came out to collect, as you have told us, was past due for some time?

A. Yes. [105]

(Testimony of Nellie Lee.)

Q. Will you tell the Court substantially what occurred in that meeting when he came out; what you said to him and what he said to you.

A. Well, he asked me about the condition, the financial condition of the company. I told him that we were in financial difficulties, we didn't have the money, wanted to pay our creditors, but weren't able to. So he said what do you want us to do about it? I told him at the present time we were working very hard with a number of parties seeking additional capital.

Q. Yes; did he ask you any questions?

A. He asked also if they were the only ones we owed money to. I said no, there were numerous ones. He also asked if they were the largest or the smallest, and I said we had many larger and many smaller. And he asked how we intended to take care of our obligations, and I felt that we were really in a very serious condition, didn't have the money to pay them and we were working, trying to get additional capital.

Q. You told him that? A. Yes.

Q. What did he say?

A. He seemed to be very conscientious and asked what other assets we had, whether we had stores that owed the company any money or not, and I said yes, they did, because I for myself owed money, the Lakeside, and I know I owed money, but [106] I couldn't pay because we were just starting the business and we were overly hopeful and we just kept getting behind.

(Testimony of Nellie Lee.)

Q. You had a franchise from the corporation and you were operating the store?

A. The Lakeside store was mine.

Q. This conversation took place—

A. The first conversation when I met him, yes.

Q. Anything else said at that time by you and by Mr. Norberg, and if so, tell it to the Court.

A. He asked whether there were other creditors. I said there were, so he said what do you intend to do about that and I said we had to get additional capital and then would give them a certain payment and the rest have to be on a payment plan. He said he wasn't interested in other companies, interested in his own, just collecting for his one client.

Q. How long did this conversation take place?

A. There were interruptions, because I was working at the store myself and when the customers came in I had to stop, but I would say the conversation, I would say that he was there for at least twenty minutes.

Q. And was there—pardon me.

A. (Continuing): He asked where he could find Mr. Loudolf and I said, "Well, I think Mr. Loudolf will call me later in the day." We did keep track of each other. Mr. Loudolf, he was out seeing different parties trying to get them to put money [107] in the company.

Q. And were there any other conferences subsequent to the one you have just related?

A. Yes.

Q. Where did that—

(Testimony of Nellie Lee.)

A. Made an appointment for the very next morning for Mr. Loudolf to meet at the Lakeside store.

Q. Who made the appointment?

A. Well, he asked me to see if I could locate Mr. Loudolf.

Q. Go ahead.

A. Mr. Loudolf called, so I made the appointment for the next day. Mr. Loudolf came, Mr. Norberg came out and I went down to the store, sat on the side table. I didn't participate in the conversation.

Q. You took no part?

A. In that second meeting, no.

Q. Now, subsequent to that second meeting were there any other conferences held there or any place else?

A. I would say not until after the attachment was entered. I had seen Mr. Norberg at Mr. Kolb's office, I would say, a number of times, about three times.

Q. Who arranged those appointments at Mr. Kolb's office?

A. I don't remember for sure, but I think it was Mr. Kolb called me at the Lakeside store. Naturally he was very concerned about it. [108]

Mr. Berger: Just a moment, that is not responsive. The question was, who called?

Mr. Margolis: It may go out.

Q. Just tell us what took place and not your feelings about it, Miss Lee. Do you know who

(Testimony of Nellie Lee.)

arranged for the first conference that you now suggest was over at Mr. Kolb's office? If you do, tell us; if you don't tell us that.

A. I don't remember which one of the gentlemen called me, but I knew it was concerning about the Norberg case because I was—we all were concerned about it because of the suits—

Mr. Berger: Just a minute; move to strike the last of that.

The Court: You needn't go into that.

Q. (By Mr. Margolis): Where did that take place, this subsequent meeting?

A. You mean on the third meeting?

Q. Yes. A. At Mr. Kolb's office.

Q. Who was present?

A. Mr. Norberg, Mr. Kolb and Mr. Loudolf and I.

Q. Could you tell us substantially what was said at that time? Did you participate in the conference? A. Yes.

Q. Did you make any statements to either of the gentlemen present? [109]

A. Yes, I would say I did.

Q. And will you tell the Court substantially what you said and what was said to you in response thereto?

A. Well, we were concerned, we were trying to get them to lift the attachment.

Q. Tell us what was said.

A. I told him the company was in very serious financial trouble.

(Testimony of Nellie Lee.)

Q. Yes.

A. And I didn't think it would really go through unless we had additional capital, naturally we were very concerned not having the company going, because it isn't not only the money put in ourselves—

The Court: You needn't tell that. Anyone that has money in a company that is about to go on the rocks is concerned, that is human nature. I fully understand that, but there is no use for her to tell it again. It is objectionable.

Q. (By Mr. Margolis): Can you tell us what was said by yourself to these gentlemen, not what you are naturally interested in, what you said and what they said to you?

A. Actually the company didn't have the money to pay them.

Mr. Berger: I move to strike that.

The Court: Well, I will strike it. Did the company have the money to pay it?

The Witness: No, we did not.

The Court: There is your response. [110]

Q. (By Mr. Margolis): And what was said about the attachment, the lifting of the attachment; you just mentioned something about it. Did you say something to somebody about the lifting of the attachment?

Mr. Berger: That is certainly a leading and suggestive question, your Honor.

The Court: Well, I think it is.

Mr. Margolis: I will reframe it.

(Testimony of Nellie Lee.)

Q. Tell us what was said at this particular conference by yourself and to whom you said it, substantially the words you used.

A. I told them the company didn't have the money.

Q. All right, what else was said?

A. And then they asked how they were going to get paid.

Q. All right, who asked that?

A. Mr. Norberg asked how they were going to get paid if we didn't have the money.

Q. What did you say in response to that?

A. In order to solve the problem I told them that we were trying to get additional capital. We didn't have the money at that time to pay them, but if we would get additional capital we would pay it on the equal plan. They were not the only creditors.

Q. You told them they were not the only creditors? A. That is right. [111]

Q. Did you discuss the financial condition of the Brick O'Gold Corporation at that time other than what you have just related?

Mr. Berger: That is a leading and suggestive question, too, your Honor.

The Court: Yes, I think she has told a pretty full discussion.

Mr. Berger: Yes.

Mr. Margolis: Submit the objection.

The Court: You may ask if anything else was said.

Q. (By Mr. Margolis): Can you tell us?

(Testimony of Nellie Lee.)

The Court: And if the answer is yes, say what it was.

Q. (By Mr. Margolis): Was there anything else discussed on the occasion of this conference, a portion of which you have just related to us? Did you hear me? A. I didn't quite understand it.

The Court: Miss Lee, you have testified as to certain conversations had among the four of you. Is there anything else that was said there that day and at that time in regard to the company affairs, pro or con; do you have a recollection?

A. I told them if they did not lift the attachment they would force the company into bankruptcy. Naturally exerting all efforts to avoid that.

Q. To whom did you say that?

A. To both Mr. Norberg and Mr. Kolb.

Q. At the time of this conversation? [112]

A. Yes.

Q. Was there any response to that made by either of the gentlemen you have mentioned? Did they say anything in answer to that?

A. Mr.—they said, either get their money or they didn't care, just as soon be in bankruptcy.

Q. Who said that?

A. I believe it was Norberg that said that.

Q. Was there any subsequent conference had other than the one you just related, or was that the last one? A. You mean at the office?

Q. Any place.

A. I would say there was two other meetings and all went over the same thing.

(Testimony of Nellie Lee.)

Q. And where were those two other meetings held? A. I believe at Mr. Kolb's office.

Q. Who was present at those meetings?

A. At one occasion just Mr. Kolb and Mr. Norberg and I, and the other occasion, Mr. Loudolf, Mr. Kolb and Mr. Norberg.

Q. At this last occasion you speak of was there any discussion in addition to—

Mr. Berger: When?

Mr. Margolis: I think, counsel—

Q. Now, can you tell us with reference to this first conference in Mr. Kolb's office to which you testified a moment ago, when that next one was held at which time both Mr. Kolb and [113] Mr. Norberg and then you and Mr. Loudolf were present?

A. I would say about two days.

Q. Two days. And was there anything else discussed at this last conference other than your statement that we went over the same things?

A. I asked for the financial statement.

Q. Who asked for it?

A. I believe both of them did.

Q. I see, and what was the response?

A. We brought the financial statement and they wanted a breakdown of the accounts receivable, and the reason why we didn't tell at that time, because they always acted in such confidence and kindly manner, but as soon as we gave the information they turned around and attached, and we were trying to avoid any further attachments or suits.

(Testimony of Nellie Lee.)

Q. This conference took place after the attachments were made? A. Yes.

Q. Is that correct? A. Yes.

Q. And suit was filed on September 12 by Norberg? A. Yes.

Q. Was there anything else discussed at this last meeting you speak of in addition to what you have already told us?

A. Well, I think the question really resolved on how they were getting paid and how quickly they could be paid. [114]

Q. Reiterated what had taken place before?

A. Yes.

Mr. Margolis: You may cross-examine.

#### Cross-Examination

By Mr. Berger:

Q. Miss Lee, you are an officer and have been an officer of this corporation?

A. That is correct.

Q. And when did you become—did you hold any office besides director—I assume you were a director of the corporation, were you not?

A. That is right, I was secretary.

Q. Secretary from its inception?

A. From the beginning.

Q. From the beginning. And as such did you have any knowledge of the business affairs of the corporation as such secretary?

A. You mean knowledge and experience?

(Testimony of Nellie Lee.)

Q. No, knowledge of how the business or corporation was going along.

A. I was active in it all the time.

Q. You were active, o.k. How much stock did you hold in the corporation?

A. About \$10,000.

Q. Did you pay for it in cash?

A. That is right.

Q. And that was all the stock was subscribed for, was it? [115]

A. It was for stock in the corporation.

Q. Now, Miss Lee, you said that you were, you had a meeting and you were quite active—had a meeting in the office of Mr. Kolb and quite active in the corporation at the time. What did you do, did you keep any records of the financial condition of the corporation? A. The bookkeeper did that.

Q. Did you have any access to any records or financial condition of the corporation?

A. Access to it?

Q. Yes. A. Yes, I did.

Q. Did you ever check them? A. Yes.

Q. You looked them over quite thoroughly, did you, whenever you wanted to?

A. Whenever I wanted to.

Q. Did you ever look them over at any time prior to September, 1949?

A. I believe so, yes.

Q. I show you defendant's exhibit D. Did you ever see this financial statement before?

A. Yes, I did.

(Testimony of Nellie Lee.)

Q. And you were well acquainted with it, were you, at the time it was made? [116] A. Yes.

Q. You knew all about the financial condition of the corporation as reflected by that financial statement prior to its being made, is that correct?

A. Yes.

Q. What was the purpose of making that statement, do you know, Miss Lee, in July, 1949?

A. We had Trumbull, who was doing our accounting for us, for the company, and also for the other franchise stores and the work he did was not satisfactory.

Q. I asked what the purpose was.

Mr. Margolis: Just a moment, I think she is entitled—

Mr. Berger: All right.

The Court: Yes.

Q. (By Mr. Berger): Go ahead, I am sorry, I didn't mean to interrupt you.

A. (Continuing): He was not satisfactory, and due to that they filed a suit against us because their work had not been satisfactory, the reason that the stock was never issued—

Q. I asked you—

A. I am coming to that, if you don't mind. So because of that and also all along we were having some difficulties, as all new businesses are, we had many problems and since we owed money our creditors got, naturally, more concerned, especially with a new company; that is why we had the [117] certified accountant make this statement for us.

(Testimony of Nellie Lee.)

Q. What was the purpose of the statement?

A. What is the purpose of the financial statement?

Q. Who did you ask to prepare that statement?

A. This?

Q. Yes.

Mr. Margolis: We object to the question, assuming something not in evidence, whether she asked it be—

Q. (By Mr. Berger): Who prepared this statement?

The Court: She will know what accountants did it.

The Witness: Yes.

Q. (By Mr. Berger): Yes. Who prepared this statement?

A. That was copied from the worksheet of the Burrows, Parker, Carson & Harms, C. P. A. accountants in San Francisco.

Q. Was this statement prepared for the purpose of asking the RFC to obtain a loan of money, do you remember?

A. That statement was prepared for that, naturally, trying to get additional capital, have to have a financial statement.

Q. This was prepared for the purpose of getting additional capital?

A. That and also necessary for the bookkeeping itself.

Q. This statement represented a true and correct picture of the corporation, does it?

(Testimony of Nellie Lee.)

A. Should I doubt the CPA?

Q. Do you know of your own knowledge? If you don't, you may [118] answer so.

A. As far as my knowledge, I would say that is correct.

Q. O.K. Now, you were served with a summons in a suit some time in September, were you not? In the suit brought by Mr. Kolb's office, you were the party that was served with a summons?

A. Was it served at the Lakeside store?

Q. I don't know; you would know better than I would.

A. We received so many suits at that time I wouldn't say whether I received it or one of the other officers.

Q. Who were the other officers besides yourself?

A. Miss Etta Lee, myself, and Mr. Loudolf.

Q. Three of you? A. Yes.

Q. Who is Etta Lee? A. She is my sister.

Q. Where is she?

A. She lives in Richmond.

Q. Richmond, California?

A. But never active in the company.

Q. And was she ever over in San Francisco or in the Lakeside store?

A. Not in the Lakeside store, I am in there myself.

Q. Over in San Francisco?

A. Just occasionally, once or twice a week [119] only.

(Testimony of Nellie Lee.)

Q. And you said you received a number of summons during the month of September, did you?

A. In the month of September.

Q. Or October? A. Yes, I would say yes.

Q. And what did you do with those summons? Did you bring them to Mr. Loudolf?

A. Mr. Loudolf always had access.

Q. I asked you whether or not you brought them to Mr. Loudolf; do you remember?

A. If they were served to me in the Lakeside store, I was working at the time at the Lakeside store, stayed at the Lakeside store; Mr. Loudolf came out, and naturally I would show them to him.

Q. You would show them to him? All right. Now, at the time Mr. Norberg first came out there, Miss Lee, isn't it a fact that the only conversation he had with you and all he was interested in was a payment of this claim and only talked a few minutes with you about the claim that he had, isn't that correct?

A. The only thing he talked about was collecting the—for his client.

Q. That is all, he didn't ask you about anything else other than collecting that money for his client?

A. Oh, he asked me about the company. He asked the financial [120] condition of the corporation and what our plans were.

Q. And did you tell him anything at all about this financial condition as represented by this exhibit?

(Testimony of Nellie Lee.)

A. I didn't have the statement with me in the store at that time.

Q. But you knew about it at that time, did you not?

A. I told him, yes, I talked about the financial condition of the company.

Q. And did you give him any information about the financial condition of the company as set forth on this statement?

A. Unsupported statement, why did I just pull figures—

Q. You knew about the statement and the figures?

A. I knew about the condition of the company.

Mr. Margolis: Just a moment. I object to the question.

Mr. Berger: All right.

Mr. Margolis: As argumentative.

The Court: I don't think it's argumentative. She knew about it.

Q. (By Mr. Berger): And did you tell Mr. Norberg at that time when he first came out to see you that this statement showed—that is, that you had a lot of accounts receivable, that your financial condition was sound as set forth on the statement?

A. I told him that we had accounts receivable and if we could collect them we would be able to pay our creditors quite well, but not be able to collect from them at all, not even pressing. [121]

Q. Did you make any attempt to collect them?

A. Yes, we did. We sent out statements and

(Testimony of Nellie Lee.)

told them and tried to go and see them in person, the different stores.

Q. You said you were not even pressing?

A. What do you mean, you want to close them up? Naturally, the company didn't want to close the stores up.

Q. You didn't press for the payment?

A. With the stores closed, the company was finished anyway right at that time.

Q. You did not press them for payments did you?

A. We asked certain—wrote them statements, went to see them for it.

Q. You remember this conversation that you had in Kolb's office when Mr. Kolb was there and you were there and isn't it a fact that both you and Mr. Loudolf told Mr. Kolb at that time when this statement was presented, presented rather, that you were financially sound. Do you remember telling him that as testified to by Mr. Kolb this morning?

A. We told him we were sound, but we needed time. Without the time we would not be sound.

Q. And do you remember a conversation with reference to the so-called reorganization as mentioned by Mr. Kolb? A. I didn't understand.

Q. Do you remember Mr. Kolb making a statement on the witness stand today that he suggested that you reorganize your [122] organization under a certain section of the Bankruptcy Act. Do you remember such a conversation? A. Yes.

(Testimony of Nellie Lee.)

Q. And do you remember whether or not Mr. Loudolf said he didn't want to do that, because they were sound?

A. I would not believe Mr. Loudolf said that.

Q. You don't believe, but you are not sure, are you?

A. The only thing I know about, when we were up in the office, "I know the company is in very critical condition, yes, I know very well," said to Mr. Kolb or Mr. Norberg because we were still trying to save it, as I had told them and the parties that would have a chance to save it. In fact, they asked me to say where we were trying to get capital from. I did not tell, we did not tell them, they would go and see the other person and kill our chances later.

Q. I asked you a question, Miss Lee. Ask the last be stricken. I asked you the question as to whether or not you made the statement to Mr.—either you or Mr. Loudolf in your presence made the statement to Mr. Kolb that you did not want to reorganize because you were solvent. Was that statement—

A. I don't believe he said it.

Q. Are you positive it wasn't said?

A. I am quite positive it wasn't said.

Q. Is it not a fact that Mr. Kolb asked you for a breakdown of some of these accounts receivable on a number of occasions? [123]

A. Yes, he did.

Q. And did you give it to him?

A. No, I did not.

Q. So your whole concern, really, isn't it a fact,

(Testimony of Nellie Lee.)

Miss Lee, that your own concern was that you did not have at that time the money with which to pay your bills? A. We did not have the money.

Q. Isn't that correct? A. That is correct.

Mr. Berger: That is all.

Mr. Margolis: You have no further questions?

Mr. Berger: Just a moment.

Q. Miss Lee, did you make any entries at all in the books for the corporation, do any kind of book-keeping for the corporation?

A. No, I did not, except that after the corporation was on a c.o.d. basis, then I had to make the entries.

Q. When did it become on a c.o.d basis?

A. I believe in August.

Q. In August, and you were then taking care of the books in August?

A. Just the daily entries.

Q. Receive a salary for that?

A. No, I wasn't.

Q. Isn't it a fact, Miss Lee, that you told Mr. Norberg when he [124] was there to talk to you, isn't it a fact that you told him you were receiving \$200 a month from the corporation as such book-keeper?

A. I did not, I did not receive—I never told him I received that.

Q. I just ask you the question, Miss Lee.

Mr. Berger: That is all.

Mr. Margolis: No further questions.

The Court: You may go down.

(Witness excused.)

Mr. Margolis: We would like to offer in evidence, your Honor to complete the plaintiff's case, the file, No. 38302-G, the bankruptcy proceedings.

The Court: Consisting of what documents?

Mr. Margolis: The schedules, your Honor.

The Court: Yes, the schedules should be in.

Mr. Margolis: There is no dispute as to the date of the filing, of the inventory. We won't burden the court.

Mr. Berger: Any records you show when it was adjudicated?

Mr. Margolis: I don't think that is important.

Mr. Berger: Yes, it is.

Mr. Margolis: Well,—

Mr. Berger: No notice goes out until there is an adjudication.

The Court: Yes, I think we want the date of the adjudication. [125]

Mr. Margolis: All right, your Honor.

Mr. Berger: One until the notices go out and the notices do not go out until after adjudication.

Mr. Margolis: I think the final date is, but all that is the date of the filing of the petition.

The Court: Well, the complaint alleges that the adjudication was on November 28th.

Mr. Margolis: That is correct, it is here, your Honor.

Mr. Berger: That is what I wanted.

Mr. Margolis: We offer that as plaintiff's exhibit next in order, your Honor.

The Clerk: Plaintiff's Exhibit 5 admitted and filed in evidence.

(Whereupon, the file, case No. 38320-G in bankruptcy, marked Plaintiff's Exhibit No. 5, in evidence.)

Mr. Margolis: That is the plaintiff's case, your Honor.

The Court: Proceed with the defense.

Mr. Berger: At this time, your Honor, may I make a motion, if the Court please, for a non-suit upon a number of grounds.

The whole gist of the case is to whether or not the defendant knew or had reason to know or reason to believe that the date of the attachment of September 12th, whatever it was, September, 1949, that Mr. Loudolph and the corporation was insolvent. Now, the mere fact on a contract you are unable to [126] pay the bills, unable to pay money is not in and of itself an act of bankruptcy, or is not in and of itself knowledge that the people are insolvent. It was testified to by Miss Lee that the primary purpose was to get time, because it didn't at that time, have the cash, although in their own statement and which your Honor can take into consideration, Defendant's Exhibit D, statements made by Mr. Kolb, certainly he has no interest in that one way or the other, that not only was he told by Mr. Norberg and in his presence was told and according to the statement that they were solvent at that time. Now, if they were solvent at that time and the defendant were so informed, certainly where is the reason to believe, and must be more than just a suspicion, that the people are insolvent, must be something more, and in fact the courts

held a number of times first, two conditions must exist, or three conditions must exist, that at the time of the levy and within four months the defendant must be insolvent. In other words, while he is insolvent and the question whether he was insolvent, if he was insolvent, and also the date of the levy. That is one thing, but the defendant must know that fact, not a mere suspicion. The mere fact of being unable to pay the bills, the mere fact of not having enough money to pay the bills with, the mere fact of being financially embarrassed in and of itself is not sufficient grounds, sufficient reasons to hold,—I have the authorities here, the rule that the defendant had [127] that knowledge or the rule that the man is or is not insolvent, stated in the case of—I have a copy of this brief I would like to present it, if necessary, the case of Grey against Little, 97 Cal. App. 442.

“The fact, alone, that a creditor knows his debtor to be financially embarrassed and pressing for a payment of his claim, is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent.”

Many cases—Cate against Certain-Teed Products Corporation, 23 Cal. 2nd 444. The Court stated the general rule in that regard as to what constituted reasonable cause, citing the case of Grant against First National Bank, 97 U. S. 80, then goes on to say, I will just read the high spots of it, your Honor please, don’t wish to take too much time. That:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the Act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing [128] circumstances, and yet have no cause for a well-grounded belief of the fact."

Digressing a moment here, not only did he have no grounds, but he was told by the President of the corporation with the statement that they were perfectly solvent.

The Court: Well, I think he had very good grounds and I think he acted very wisely in choosing and attempting everything possible to get rid of his indebtedness.

Mr. Berger: You mean he had good grounds to proceed?

The Court: Yes.

Mr. Berger: Well, by that your Honor means reasonable cause to believe that the man was not solvent in September?

The Court: I certainly think so.

Mr. Berger: Well, that is a matter of your Honor's conclusion. I may state, according to these authorities, the mere fact of being unable to pay,

financially embarrassed, is not sufficient grounds.

The Court: That is very true. We have plenty of testimony here, including you, that these people were greatly concerned, they didn't believe the representations and the financial statement, went behind it, made inquiry, and they directed their lawyer to get their money or get security.

Mr. Berger: The reason they didn't believe him was because two reasons, first, that they contended they had no cash because of a tie up in a fictitious suit, that is claimed, and second, [129] because they couldn't rely on Mr. Loudolph by reason of not keeping appointments by reason of not doing anything toward keeping of his promises had he kept his appointments.

The Court: These are very good reasons to suspect an organization and I am put on notice that there is something wrong.

Mr. Berger: It may be possible he is that type of an individual, that is the way he does business, and still the business in and of itself—this is a corporation—the business in and of itself—

The Court: I am sorry, I don't agree with you. I will refuse your motion.

Mr. Berger: I will continue on for a few moments, your Honor. May it also be a fact, just because a party is unwilling to trust him further, just what your Honor just stated, "He may feel anxious about his claim, and have a strong desire to secure it—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment on a debt, under such circum-

stances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men, constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose. \* \* \* To [130] overrule and set aside all his transactions with his creditors, made under such circumstances \* \* \* would make the bankrupt law an engine of oppression and injustice. Hence, the Act, very wisely, has we think, instead of making a payment or a security void for a mere suspicion of the debtors insolvency requires, for that purpose, that his creditors should have some reasonable cause to believe him insolvent."

Now, where is the reasonable cause as far as Mr. Norberg is concerned? In view of the statement being rendered and in view of the fact of the—not only the written statement, but the verbal promises, statements made in Kolb's office that they were solvent at that time. He refused a reorganization as suggested by Mr. Kolb, and then continuing on—Collier's on Bankruptcy, Volume 2, chapter 60, page 1298:

"But the proof of such 'reasonable cause to believe' is now to be directed to the effect of the transfer, rather than the intent of the debtor in making it. There must be proof, both of insolvency of the bankrupt at the time of the transfer and reasonable

cause to believe on the part of the transferee that such transfer would effect a preference, \* \* \*

"On the other hand, when debtor is in failing or insolvent circumstances, he has a right to prefer one creditor in preference to another, and if accepted by the creditor in good faith such preference will be sustained, even though it has the effect to delay, hinder or defeat other creditors. Where a [131] debtor pays and a creditor receives the amount of a just debt, the good faith of the transaction will be presumed, but upon proof that a voidable preference resulted the initial presumption is destroyed."

The burden of proving that is upon the trustee. He must prove both of those points, he must prove every point that he now urges: one, that there was prejudice; two, there is knowledge of the insolvency to such an extent that it is more than just mere suspicion.

That goes on to the question of financial condition, and the statement in and of itself—if your Honor desires to check it over—shows that as of July the financial statement was a \$97,688 asset and a \$64,000 liability; their assets far in excess of their liabilities. Now, relying upon that statement, this, mind you, is prepared by the bankrupt itself, no one else, and prepared long before the petition in bankruptcy was filed against them. In July of 1949, as regards that condition then and as testified to by the bankrupt, they remained in that condition up until the date of the bankruptcy. Why? Whereas, then either somebody is not telling the truth, either

the financial statement is wrong, or Mr. Loudolph is not telling the truth.

The Court: You didn't rely upon the statement; your own testimony is after they saw the statement they were not satisfied with it; couldn't get the president of the corporation to elucidate it. I refuse your motion. [132]

Mr. Berger: Mr. Norberg.

### JAMES R. NORBERG

called as a witness for and on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your name to the Court, please?

A. James R. Norberg.

### Direct Examination

By Mr. Berger:

Q. And what is your business or occupation, Mr. Norberg? A. Collection agency.

Q. You operate under what name?

A. Norberg Adjustment Bureau.

Q. And do you know Mr. Loudolph, do you?

A. Yes.

Q. When was the first time you had occasion to meet him? A. September 10, 1949.

Q. Where?

A. At the Lakeside Store of Brick O'Gold.

Q. Who was present at the time?

A. Miss Nellie Lee, Mr. Loudolph and myself.

Q. Was that the first time you were there?

A. No.

(Testimony of James R. Norberg.)

Q. When was the first time you were there?

A. September 9.

Q. And who was present at that time? [133]

A. Miss Lee and myself.

Q. And September 9, you say? A. Yes.

Q. Why did you go there?

A. It was an account assigned to our office for collection.

Q. By whom?

A. Radio Station KJBS, giving the principal place of business of the debtor concern being Brick O'Gold as Redwood City. I drove down to Redwood City and saw the girl in the office there, who told me I would have to see either Miss Lee or Mr. Loudolph, and they could be reached in San Francisco. So I came back to San Francisco and at that time met Miss Lee at the store.

Q. That was on September—what date?

A. September 9.

Q. And what was the conversation at that time?

A. I made demand upon Miss Lee for the amount of the account in full, and she told me that I would have to come back the next day, that she didn't have the money right then; however, she would arrange it and pick up the money the next day.

Q. Was there anything else said about any other accounts? A. Not at that time.

Q. Well, can you relate as fully as you can that whole conversation that first day you were there with Miss Lee?

(Testimony of James R. Norberg.)

A. I wasn't there but a few minutes the first day. [134]

Q. What was the total conversation at that time?

A. Make a demand, when I made a demand on her for the amount of the claim——

Q. Yes.

A. And she told me that I would have to see Mr. Loudolph and they would have the money the next day, that Loudolph would also be there, for me to come back the next morning.

Q. Did you go back the next morning?

A. I did.

Q. And who was present at that time?

A. Mr. Loudolph, Miss Lee and myself.

Q. What was the conversation then?

A. Incidentally, there was someone else, a Mr. Padilla.

Q. Who is he?

A. He was an employee of mine at the time.

Q. Employee of yours? A. Yes.

Q. Is he with you now? A. No.

Q. What was the conversation at that time?

A. I dropped in to pick up the check, I told him I had come for the check. They said they didn't have the money, that the corporation was in a position where they didn't have enough cash on hand to pay that kind of money out, because the account was in excess of \$1,000 and that they were working on something [135] and would have the cash for me immediately.

And I asked what they meant by "immediately."

(Testimony of James R. Norberg.)

They said, "Well, they had hoped they would have it by that morning." However, Mr. Loudolph had an appointment with some other gentleman that afternoon—this was on a Saturday—and he was to see this man that afternoon at his home and go, work out arrangements with some man, they were borrowing some money to put into, reactivating the corporation, and that he would have a check for me by Monday without fail. I told him if I had a check by Monday, all right; if I didn't I was filing a suit.

Q. Anything else said by Miss Lee or Mr. Loudolph in reference to the condition of the corporation?

A. No, they said all right, the only thing was they didn't have enough ready cash on hand for someone to walk in and demand \$1,000 cash.

Q. And did they tell you why they didn't have enough ready cash, did they explain their condition?

A. There was something about the plant they had in Redwood City, that they had put a lot of money into it and also in accounts receivable, and through this plant they had originally planned to manufacture their own products down there. However, due to some other circumstances, why, they were not manufacturing their own products and therefore it was taking more than what the amount of cash they had on hand to keep in operation. [136]

Q. Mention anything at all about any attachment at that time? A. No.

Q. And was there anything at all said about any other creditors, testified to by Miss Lee?

(Testimony of James R. Norberg.)

Mr. Margolis: We object to the question on the ground it is suggestive and leading, this witness is—

The Court: I don't hear you when you sit.

Mr. Margolis: I beg your pardon, your Honor, I have a sore back. I object to the question, may it please your Honor, on the ground it is leading and suggestive, the witness is one of the defendants in this case.

The Court: Suppose you reframe it.

Q. (By Mr. Berger): You heard Miss Lee testifying a moment ago, did you not, Mr. Norberg?

A. Yes.

Q. And you heard her state, make the statement, did you not, she told you all about these other creditors and that they would have no money to pay the other creditors if she paid you, something to that effect?

A. No, I don't remember anything, of any conversation like that at that time.

Q. Was anything at all said about other creditors at that time? A. No.

Mr. Margolis: I object to the question. [137]

The Court: I will allow the question.

Mr. Margolis: That is suggestive.

The Court: I will allow it.

Mr. Berger: Thank you.

Q. Was there? A. No.

Q. Nothing at all? A. No.

Q. Was there anything at all said about the

(Testimony of James R. Norberg.)  
financial condition of the company at that time by  
Miss Lee?

Mr. Margolis: Object to the question, may it  
please your Honor—

The Court: You may answer.

Mr. Margolis: On the grounds it has been here-  
tofore answered.

The Court: You may answer.

A. Miss Lee had very little to say due to the fact  
that she was behind the counter most of the time and  
most of the conversation was between Mr. Loudolph  
and myself.

Q. Did Mr. Loudolph make any reference to any  
financial statement at that time? A. No.

Mr. Margolis: We renew the objection, leading  
and suggestive.

Q. (By Mr. Berger): Was there anything [138]  
at all?

The Court: I will allow the question; I will allow  
the answer.

Mr. Margolis: All right.

Q. (By Mr. Berger): Now, Mr. Norberg, Miss  
Lee also made a statement to the effect that she had  
reference to other creditors while she was on the  
witness stand; did you hear her make that state-  
ment?

Mr. Margolis: We object to the question, may it  
please your Honor, on the grounds it is leading and  
suggestive.

The Court: I don't think it is leading and sug-  
gestive, he asks if he heard Miss Lee make certain

(Testimony of James R. Norberg.)

statements on the stand. I assume he is going to ask whether or not his recollection is that occurred or not.

Mr. Berger: That is all.

The Court: Does it contradict her or corroborate her.

Mr. Berger: That is what I want to find out, your Honor.

Q. Do you remember the question?

A. May I have the question?

Q. I will reframe it. Did you hear Miss Lee make a statement while she was on the witness stand that when you asked her for her payment on your bill, what about the other creditors; was there anything at all said about that by her? A. No.

Q. Was there anything at all said by Mr. Loudolph at that time about other creditors? [139]

A. No.

Q. Did you have any discussion with either Miss Lee or Mr. Loudolph at either of your meetings at that store about any other creditors?

Mr. Margolis: Renew the objection on the same grounds.

The Court: I will allow him to answer.

A. You mean at the store?

Q. (By Mr. Berger): At the store at that time.

A. No.

Q. Now, can you recollect, Mr. Norberg, if there was anything else said at the store at either of those meetings other than what you have just testified to?

A. Well, there was another meeting sometime

(Testimony of James R. Norberg.)

after I filed suit, I mean at the store—you are talking about meetings prior to the suit?

Q. That is right. A. No, nothing else.

Q. Now, when was the next time you saw Mr. Loudolph or Miss Lee?

A. About September 20, around in there.

Q. Around September 20? A. Yes.

Q. And where was that meeting?

A. At Mr. Kolb's office.

Q. And who was present? [140]

A. Miss Lee, Mr. Loudolph, Mr. Kolb and myself.

Q. Can you relate the conversation, what occurred at that time?

A. Miss Lee and Mr. Loudolph were attempting to negotiate with me so that I would lift my attachments that I had levied. And I refused to have the attachments released unless my account were satisfied in full. It is pretty hard to confine my answer to any one meeting.

Q. Well, put it this way: Did you have several meetings right immediately following?

A. Yes, there were approximately three meetings.

Q. How close together?

A. Well, the first one—that is, there were three meetings in Mr. Kolb's office and also another meeting at the store.

Q. How close together?

A. Within a period of two weeks.

Q. Two weeks?

(Testimony of James R. Norberg.)

A. Between two and three weeks.

Q. During those meetings who was present?

A. Miss Lee and Mr. Kolb and myself at one of them and Miss Lee, Mr. Loudolph and myself.

Q. Explain what occurred as best you can in chronological order with reference to the meetings.

A. At the first meeting they certainly tried to get me to lift my attachments and I told them I would only lift them [141] if they could raise the money to pay off in cash. They said they couldn't get the cash, that is why they wanted me to lift the attachments, wanted to borrow some cash which would enable them to pay me in full, wouldn't be able to do it with the attachment on, and then there was something brought up wherein Mr. Loudolph was negotiating with the Reconstruction Finance Corporation trying to borrow money down there, and the reason that he gave for not being successful in obtaining his loan was due to the fact that they didn't feel that they were large enough concern to be borrowing from the R.F.C., they usually dealt in larger volumes of dollars and cents.

Then there was negotiations that they were making, so they told me, and Mr. Kolb, for Samarkand Company to operate the plant, operate out of their plant and somewhere along the line that fell out, so Samarkand was contemplating, very interested in purchasing the Brick O'Gold in its entirety and paying off all liabilities of the corporation. This fell through and at the meeting that Miss Lee was there alone we asked if Miss Lee wouldn't attempt to ne-

(Testimony of James R. Norberg.)

gotiate these things herself because of the fact that Mr. Loudolph was very unreliable about these things. Tried to get together and unable to contact him at times and also at times he wouldn't show up for an appointment, so Miss Lee said she was very interested in it, she showed a lot of interest by always being there, being very conscientious, asked if she wouldn't attempt to negotiate with [142] Smar-kand herself in regard to either their operating the Brick O'Gold or buying them out, and then finally she lost interest in it. Also suggested at one of the meetings that reorganizational bankruptcy be entered into by the corporation. At no time—during the conversations on many occasions the financial statement was referred to and we couldn't understand how a corporation with the amount of assets, compared to the liabilities could allow themselves to get in so low with the cash resources. And the question came up as to whether or not that financial statement was correct or whether they were using it as just a blind to show someone, trying to sucker them in for some money and both stated the financial statement was correct and Miss Lee told me that she had been handling the books for the corporation and she was to receive a salary of—I believe it was \$200 a month. However, she had quit handling the books because of the fact she wasn't getting any money for it and felt she could devote herself to the Lakeside Store to more advantage, financially, to herself and stay down there and not get paid for it.

And getting back to the financial statement, we

(Testimony of James R. Norberg.)

asked if that was correct. They said it was correct and knew it was correct and that they were in a solvent condition, at no time were they in an insolvent condition at all. That is pretty much the story that went on at all of the meetings.

Q. Was this financial statement shown you, this statement I [143] now hold, defendant's exhibit D, produced at any of those meetings you held?

A. Yes.

Q. When and where?

A. Well, it was at all of the meetings.

Q. Did you go over the financial statement at all?

A. Yes.

Q. Do you remember what the discussion was about that financial statement?

A. Well, there was a question that came up here as to the accounts receivable, why they should be that large and the answer was given that the corporation, having put these stores on a franchise basis, they felt they had to work along with them, small operators, in most cases a man and a wife that had taken their life savings to go into a small business venture on their own, didn't want to press. However, left alone they would be able to get us money, not being able to revert the accounts receivable into cash, and take care of their liabilities. And on the due from officers, that question came up and—

Q. What was said at that time about that?

A. Well, I didn't go into it too much with them on the due from officers. However, I was told down

(Testimony of James R. Norberg.)

there that the money was owed by Mr. Loudolph. Now, what it was owed for I didn't find out. [144]

Q. Did any of them ever tell you, either Mr. Loudolph or Miss Lee ever tell you that—withdraw that. Did you ever tell Miss Lee or Mr. Loudolph at anytime that you didn't care if they went into bankruptcy? A. No.

Q. Did any conversation about bankruptcy ever come up at any of those meetings?

A. The idea of the reorganizational bankruptcy came up.

Q. Aside from that?

A. Aside from that, yes, more or less as a—

Q. What was said and when?

A. Might be, you might say a threat, an idea put across that possibly an involuntary petition in bankruptcy would have to be filed if they did not raise the cash.

Q. Who said that?

A. I believe it was myself; I am not sure.

Q. What did they say?

A. No, they didn't want any involuntary petition. Miss Lee said she had taken her life savings, which amounted to approximately \$10,000 put into this business, wanted to have a chance to get it back out.

Q. And did Mr. Loudolph say anything?

A. Mr. Loudolph was against it. He said as the business was not insolvent it would work out, could work out, all they needed was a little time to convert their regular assets into [145] resources, into ready cash.

(Testimony of James R. Norberg.)

Q. Did you have any other conversations with him after that? A. No.

Q. Did he ever tell you anything about being on a C.O.D. basis at any of their meetings?

A. Yes, that was mentioned. They had a deal with Samarkand Company, I don't recall the figure exactly, but I believe they said they were paying 16 cents a gallon more than what they had paid in the past with the understanding that that was to be applied on their old balance with Samarkand.

Q. Did he give you the reason, did he tell you whether or not that was the reason of being on a cash basis, or give you any other reason?

A. He gave no other reason.

Q. Now, the last conversation you had with Mr. Loudolph or Miss Lee was when, Mr. Norberg?

A. Approximately the 30th of September.

Q. Approximately the 30th of September?

A. Approximately that date.

Q. And that which you just related was from the meetings that occurred, at one of those meetings?

A. Yes, what I have said, told you now, consisted of all of the meetings.

Q. And was the statement, defendant's exhibit D, again referred to at that meeting of [146] September 30?

A. Well, it was in and out of all the conversations. I couldn't say for sure whether it was in the September 30 conversation or not.

Q. And how long before September 30, in the meeting just prior to September 30?

(Testimony of James R. Norberg.)

A. About five days apart.

Q. Five days apart? A. Yes.

Q. And would you say that the financial statement was referred to at that meeting five days prior to the last meeting? A. Yes.

Q. It was referred to?

A. Yes, I would say it was.

Q. And anything at that time said about whether or not they were or were not financially embarrassed or insolvent?

A. Well, at all times they were financially embarrassed and they didn't have the cash to pay their liabilities off, but they very much stressed the fact they were not in an insolvent condition.

Q. Was there anything else at any time said to you by anyone with reference to the solvency or insolvency of the Brick O'Gold other than the fact that they were financially unable to meet their bills?

A. No.

Q. Did they give you any other information, did they tell you [147] anything else or show any other evidence of any kind to let you know or to impress upon you the fact that they were insolvent at any time? A. No.

Q. Did they mention to you how to—how much money they had coming to them from some of their accounts receivable?

A. They said it was pretty much in line with their financial statement, the financial statement at that time, the financial condition was pretty much the same as it was at the time of the making of the,

(Testimony of James R. Norberg.)

drawing up of this financial statement dated July 31, due to the fact that they had been on a C.O.D. basis and paid cash for everything, and on the Samarkand bill they had been reducing it by paying more than what they had been paying in the past.

Q. At the time at any of those meetings you had with them did you discuss with them about these accounts receivable as to whether or not they could collect them or couldn't collect them?

A. Yes, that was brought up and they very definitely said they were all collectible.

Q. Did you ask him why they did not proceed to collect the money? And pay off the obligations?

Mr. Margolis: Objection on the ground it is leading and suggestive, your Honor.

The Court: I will allow it. [148]

A. Yes, because of the fact that they did not want to press the store owners, that is the franchise holders, for the amount of the indebtedness they had because in some cases it ran pretty high for the—or they figured for a franchise holder to come up with two or three thousand dollars in cash and pay them right away.

Q. Do you remember a meeting at one time held in Mr. Kolb's office when Mr. Loudolph was there and as you heard Mr. Loudolph testify this morning that a statement was made to the—by Mr. Kolb to the effect that according to that financial statement he could get 75 cents on the dollar. Do you remember anything like that being said? A. No.

(Testimony of James R. Norberg.)

Q. Was there anything said like that at any time? A. Not to my knowledge.

Q. When was the first time you had knowledge of the bankruptcy, Mr. Norberg?

A. In January, 1950.

Q. January, 1950? A. Yes.

Mr. Berger: I think that is all, your Honor.

The Court: Each time during practically all these negotiations, Mr. Loudolph and Miss Lee were featuring this financial statement?

The Witness: That is correct. [149]

The Court: And were relying on it and said they had a lot of money owing them under these franchise stores?

The Witness: Yes, sir.

The Court: Well, you were not satisfied with the financial statement?

The Witness: Well, I wouldn't say that. I wasn't satisfied with it because I had no chance or any reason to go against the financial statement. I had not investigated as to how much money was held, you see, your Honor.

The Court: You knew—

The Witness: I filed suit.

The Court: You knew the status of the franchise stores, didn't you? They were small retail stores?

The Witness: This came up after my attachments, your Honor. You see, when I filed suit on September 12, I also had a writ of attachment on all these places. At that time I didn't know anything, didn't know whether the Brick O'Gold on

(Testimony of James R. Norberg.)

Chestnut street was owned by John Dokes, Brick O'Gold or anything about it. I learned all this information afterwards.

The Court: When they showed you this financial statement, you didn't go behind it to find out who were the people that owed the money?

The Witness: No, I only had that information in the form of writs from the Sheriff's office.

The Court: And it was owed by these franchise stores? [150]

The Witness: Yes, sir.

The Court: And you knew they couldn't be collected from in full, didn't you?

The Witness: I knew quite to the contrary, because I had seen some of these franchise holders pay off. Writs issued from the Sheriff's office shows these people owed so much money. You see, I was paid off from one store alone, this fellow paid me in full on what he owed, so as to whether or not the other franchise holders were in a position to do that, I don't know.

The Court: Well, while you were paid off in full you realized at the—

A. I don't know what disposition was made, I don't know anything about the bankruptcy.

The Court: Cross-examination.

#### Cross-Examination

By Mr. Margolis:

Q. You stated in answer to the last statement that the first you knew of the bankruptcy, was in

(Testimony of James R. Norberg.)

January, 1950, that is correct? I think you just made that statement? A. Yes, that is correct.

Q. Now, I will direct your attention to this suit card, which was sent over from the referee's office and ask you what the blue card is.

A. What the blue card is?

Q. Yes, a portion of your permanent [151] record? A. Yes, that is correct.

Q. Now, directing your attention—withdraw that. The dates, I assume, start from 9/12/49, as is indicated on the front of the card?

A. That was the date the suit was filed, yes.

Q. That was a typewritten date. Now, the dates which are in longhand writing on the reverse of that card, does that refer to 1949?

A. 1949 and 1950, yes.

Q. The information thereon contained is put there by—under your supervision and instruction and direction? A. That is correct.

Q. I call your particular attention to the language opposite the date 10/21, that is 1949?

A. Yes.

Q. And ask you to read everything after that date, please. A. Everything after that date?

Q. That is that line.

A. Pertaining to that date?

Q. Pertaining to that date, yes.

A. "Received full amount from Sheriff. Client doesn't want dollars until time for bankruptcy has passed. Pay dollars at end of December business."

Mr. Margolis: We will offer this in evidence,

(Testimony of James R. Norberg.)

may it please your Honor, and ask it be appropriately marked next in evidence. [152]

The Clerk: Plaintiff's exhibit 6 admitted and filed in evidence.

(Whereupon the document entitled "Suit Card," marked plaintiff's exhibit 6, was admitted in evidence.)

Mr. Margolis: You have told us that your first visit to the premises out at Lakeside was in September, September 9, September 8, I should say.

A. September 9.

Q. That was Admission Day, a holiday, is that correct? A. It was a Friday.

Q. A Friday?

A. I don't know whether it was Admission Day or not.

Q. And according to your record which I have just read, suit was filed on September 12, Monday following? A. Yes.

Q. And attachments levied and the full amount collected, is that correct? A. Yes.

Q. Now, you told us also that on September 20, 1949, you had this conversation in Mr. Kolb's office at which time there was present Mr. Kolb, yourself, Miss Lee, and Mr. Loudolph, is that correct?

A. I said approximately September 20, yes.

Q. Was it September 20 or some other day, do you know?

A. It may have been the 19th, the 20th or 21st, within those— [153] very close to the 20th.

(Testimony of James R. Norberg.)

Q. And at that time in your presence and in the presence of Mr. Kolb, Mr. Loudolph and Miss Lee pleaded with you to withdraw the attachment, is that right? A. That's correct.

Q. You told them you would only lift it if the account was satisfied in full?

A. That is correct.

Q. Now, Mr. Kolb heard that conversation also, did he not?

A. Yes, I believe he did. Now, Mr. Kolb was oftentimes in and out of the office.

Q. And you heard him testify that he made a number of levies on September 22, 1949; you heard that testimony this morning, did you not?

A. Yes.

Q. Now, you mentioned something about a reorganization in bankruptcy, some statement was made at that meeting of a possible reorganization in bankruptcy, is that correct, was such a statement made?

A. Yes.

Q. Isn't it a fact, that Mr. Loudolph informed you and Mr. Kolb, present at the time Miss Lee, that he was advised by his attorney to file a voluntary petition in bankruptcy?

A. May I answer that by going into it a little bit?

The Court: Yes, answer it fully. [154]

A. Mr. Loudolph, I believe, is not telling the truth on that.

The Court: He doesn't want your belief.

The Witness: Well, because of the fact that Mr.

(Testimony of James R. Norberg.)

Loudolph was very definite against bankruptcy, for one thing, and number two—

Mr. Berger: I move that—

A. (Continuing): Mr. Gay—

The Court: No matter what you think—listen to me. I don't want to know what you think. I want to know what was said and done. You can answer fully that way, but I don't care for your opinion.

The Witness: Yes, sir. I say Mr. Loudolph did not say any such thing.

Q. All right. You mentioned a moment ago then, that it was suggested that an involuntary petition in bankruptcy be filed if the cash would not be put up in payment of his bill in full, is that correct?

The Court: Where are you going?

Mr. Berger: Looking at the reporter's notes. I see it, page 101.

Q. (By Mr. Margolis): Did you so testify? You have testified that an involuntary petition in bankruptcy would be filed if the cash to pay the settlement of your claim in full was not put up at [155] once? A. I said that was mentioned.

Q. And that Miss Lee said that if that were done she would lose all her savings. You just told us that?

A. That is right.

Q. Now, what was the basis of the proposed involuntary petition in bankruptcy? What act of bankruptcy was to be relied upon for the filing of such petition?

A. Well, I am not an attorney myself and I am not familiar with the bankruptcy act, Mr. Margolis.

(Testimony of James R. Norberg.)

However, there was some reason, what it was that was given I do not know, but there was some reason given why or maybe a reason was not given. I don't know.

Q. Was this threatened?

A. Probably more or less a threat. I would say yes it was a threat because of the fact that their financial condition showed them far in excess of their liabilities on the asset side.

Q. You heard Mr. Kolb say he knew nothing about bankruptcy?

A. Mr. Kolb is not my attorney.

Q. You were there and listened to the conversation and you heard him make that statement here today? A. Yes.

Q. And you're telling this court that involuntary petition in bankruptcy would be filed on the ground that the assets far exceeded the liabilities? [156]

Mr. Berger: Just a moment, if your Honor please, I move, I object to that as, that is not a—

The Court: I don't think he said that.

Mr. Berger: No.

Mr. Margolis: Well, what basis was going to be used, what act was going to be used for the filing of the involuntary petition?

Mr. Berger: I think it has been asked and answered twice, your Honor.

The Court: Well, I don't think he has answered it.

(Testimony of James R. Norberg.)

Mr. Berger: Okay.

A. Well, not to be pert or anything like that, Mr. Margolis, but chances are if an involuntary petition would be filed I would probably come to see a bankruptcy attorney to see if anything could be done about filing an involuntary petition.

Q. Do you know of any act that was performed at or about the time you speak of which would be the basis for the filing of an involuntary petition?

A. Well, at that time I did know about the attachment that had been levied by the accountant——

Q. You did know the Trumbull attachment?

A. I have heard something about it, yes.

Q. And you did also know that Mr. Kolb had filed a suit and attachment too, didn't you?

A. No. [157]

Mr. Berger: That isn't the evidence, that isn't in the issues, first of all.

The Court: He asked whether he had or had not.

A. No, I knew to the contrary.

Q. (By Mr. Margolis): You didn't discuss the matter of Mr. Kolb's claim with him at all?

A. That isn't what you asked me.

Q. All right, I will ask you. When did you first find out that Mr. Kolb represented a creditor of the Brick O'Gold corporation?

A. Approximately September 15, be around September 15.

Q. Two or three days, two days after your attachment? A. That is about right.

(Testimony of James R. Norberg.)

Q. Yes, and you knew, did you, that Mr. Kolb had filed a suit and attachment?

A. No, quite to the contrary.

Q. What did you know?

A. I knew Mr. Kolb had filed suit.

Q. How do you know that?

A. We received the information from the Central Bureau, Central Credit Reporting Bureau.

Q. You get information of that kind from a Bureau from time to time, don't you? A. Yes.

Q. Did you have to make inquiry for that or is that just [158] sent out as a matter of course?

A. That comes to us as, we list as an account for collection that an account that has been listed with us for collection.

Q. What do you do, you list that account with this agency?

A. Well, what it is, it is more or less a clearing house.

Q. I see.

A. That is owned by several of the agencies and as an account, for instance, when an account comes into my office for collection we list that claim with this Bureau.

Q. Immediately that you receive it?

A. What is that?

Q. Immediately that you receive the account?

A. In the same day.

Q. Did you do that in this case?

A. Well, I don't know for sure if that went in. As I say, the claim came in on Friday.

Q. Yes.

(Testimony of James R. Norberg.)

A. Whether it went on Friday or Monday—sometimes the Bureaus wait until they have enough, maybe a week, before sending it on in.

Q. What was done in this case?

A. I do not know.

Q. Your records show? A. No.

Q. You say that in the ordinary course from this agency you [159] got this three days after the attachment was filed that Mr. Kolb's client had filed suit?

A. Well, maybe I misunderstood you. What I mean we would receive information about three days after that information goes down from our office, presuming that it went down on Friday, the 9th of September, we would have it back approximately—

Q. Monday, Tuesday?

A. About Tuesday or Wednesday, so I say three or four days.

Q. Have you got anything in your file at all to show what you received from this credit agency?

A. Yes. Do you have my blue card?

Mr. Berger: Your Honor, I purposely didn't object, for the purpose of saving time, and I also thought that it may lead up to something. I really think this is going very far afield and certainly incompetent.

The Court: It is cross-examination.

The Witness: Here is the card.

Mr. Berger: Of course, nothing on direct exam-

(Testimony of James R. Norberg.)

ination upon which a cross can be based, your Honor.

The Witness: You see, this card we fill it out where it is typed in black, that is from our machine, and then when it comes back, filled out like that. (Indicating.)

Q. (By Mr. Margolis): The Witness is referring to the back card which is attached to this exhibit marked plaintiff's exhibit 6.

Q. Now, can you read into the record what these hieroglyphics mean? [160] A. Yes.

Q. You say the top of the card shows "Brick O'Gold, 926 Broadway, Redwood City." And then your bureau recorded—what does that mean, you recorded with the bureau the amount of your claim?

A. No, that is just a bureau record that is printed on the card. That is just like you might put down Max H. Margolis, law office, on your stationery, they put bureau record.

Q. I know that, but I want to know about bureau record, what does that refer to?

A. I see what you mean. Right here, look over here, it is stapled, there is a number, number 21. That is my office number, we have an amount—That is our number, the amount \$1029, filed 9-49.

Q. I see. And then you get this information about other litigation and other suits and other pending matters back there, you affix it on that card there and send it back?

A. They send that back to us, that card came back to us.

(Testimony of James R. Norberg.)

Q. It shows something about a suit for materials for \$1401. That is the matter testified to by Mr. Kolb? A. May I see it?

Q. I will ask you the questions in order to speed it up.

Mr. Berger: Let him explain the whole card.

Mr. Margolis: Go ahead.

A. It shows up: "Brick O'Gold Corporation, Municipal Court—[161]

"M" stands for Municipal Court—"256298, filed 8/2/49, for services materials, \$1401—Sullivan, Roche, Johnson and Farraher" the attorneys representing the plaintiff in this action and underneath it has "M" which is Municipal Court, "256633, 8/8/49, which is the filing date, for rent \$1200."

Q. August 8, 1949? A. Yes.

Q. Suit filed for rent, \$1200?

A. Yes, that is filed by Young, Hudson and Rabinowitz. Another filed on 26th of August, number 257536 for money, \$334.00, filed by Colvin and Tyler, Attorneys at law.

Q. And on top of these you had information with respect to the Trumbull suit, the accountant filed a suit and attachment?

A. Which we thought was strictly no good, nothing for us to be concerned about.

Q. Yes, but the conversation to which Mr. Kolb testified this morning was that during this conference in September at his office a discussion was had and you were advised about the Trumbull suit and attachment which tied them up, you were advised of

(Testimony of James R. Norberg.)

that, were you not?

A. Yes. Might I state, Mr. Margolis, the reason I wasn't alarmed about that is because of the fact that I could show you cards in our office that has ten times the amount of actions filed where people are not in a bad condition at all, that is, they just [162] don't pay their bills.

Q. We have the Court for that. You also received from that bill one of those records that a suit was brought against the Brick O'Gold in the sum of \$352 on 9/20/49, Municipal Court action number 258490?

A. Yes.

Q. And that is attached to the exhibit about which we are talking about, plaintiff's exhibit number 6. and you also received from that bureau information with respect to an unlawful detainer action in the amount of \$1029, also 9/1949—September, 1949?

A. I beg your pardon, that is October 11, Mr. Margolis.

Q. Perhaps I am wrong.

A. 10-11. This shows that I filed my claim number 21. This is the other information they gave me to refresh my memory from my files.

Q. Very well. And Miss Lee, you say, told you at that conference if bankruptcy proceedings did intervene she would lose whatever she had invested in this Brick O'Gold corporation, didn't she?

A. Yes.

Q. You're positive that when you appeared at the Lakeside premises of the Brick O'Gold you were

(Testimony of James R. Norberg.)

told by Miss Lee if you would appear the next morning this bill of yours would be paid in full?

A. That is correct. [163]

Mr. Margolis: I have no further questions, your Honor.

The Court: Any redirect?

Mr. Berger: I did want to proceed, your Honor. Should we come back?

The Court: If it will take some time, if it is a matter of a few minutes I will close it up. You have other testimony?

Mr. Berger: I have no other testimony other than Mr. Norberg.

The Court: If it is to be of some length I expect we better go to morning.

Mr. Berger: I don't know, maybe only a few questions. I really don't know, your Honor.

The Court: Off the record.

(Off the record discussion.)

The Court: We can't close the case this afternoon anyway.

Mr. Berger: That is right.

The Court: We will adjourn until ten o'clock tomorrow morning.

(Thereupon an adjournment was taken until August 2, 1950, at 10:00 o'clock a.m.) [164]

Wednesday, August 2, 1950, at 10:00 A.M.

The Court You may proceed, gentlemen.

Mr. Berger: At the conclusion of the hearing yesterday I don't remember if I had completed or not completed my direct. I think Mr. Margolis was cross-examining and I wanted to ask him some more questions if I may, with your Honor's permission; and may I also, with your Honor's permission, go into some of the matters a little more fully to sort of clarify some of the matters that went on at direct examination.

The Court: You may.

JAMES NORBERG,

previously sworn, resumed the stand and testified as follows:

Redirect Examination

By Mr. Berger:

Q. Mr. Norberg, I show you plaintiff's Exhibit 6 which is a blue card attached to a white card, and has another sort of brown card attached and two slips of paper. Now, will you please explain to me, rather, refer to the blue card and under the writing on the back of the blue card dated October—

The Court: That is Exhibit D you are referring to?

Mr. Berger: No, it is plaintiff's Exhibit 6, your Honor. Under the date of October 21st, 1949, I presume it is, will [165] you read that, please?

A. "Received full amount from sheriff. Client

(Testimony of James R. Norberg.)  
doesn't want dollars until time for bankruptcy has passed. Pay dollars end of December business."

Q. I see. Now, when did you receive the money on that? A. On October 20th.

Q. October 20th. And the next day you called your client, is that right? A. That is correct.

Q. Now, will you explain or tell me why you had any reference to bankruptcy in October on your card? Did you tell your client that about bankruptcy?

Mr. Margolis: We object to the question, your Honor, on the ground—

The Court: I will allow him to explain his own answer.

A. The reason for an entry such as this is that on accounts of this size oftentimes bankruptcy steps into the picture, and the remittance must be made to the trustee, and rather than remit the money to our client and then have to go back to them and tell them that we have to put the money back into the trustee's hands, sometimes they will ask us to keep the money in our possession until the time for bankruptcy has passed in order that they need not enter it in their books and then take it off again by sending us back a check.

Q. And is that the general or usual custom or practice in your [166] business? A. Yes.

Q. You do that with all your large accounts, do you? A. Yes.

Q. Now, when did you send the money to your client? A. On October 31st.

(Testimony of James R. Norberg.)

Q. And when did you first receive knowledge of the bankruptcy? A. In January of 1950.

Q. Now, what is the next card attached to that, Mr. Norberg?

A. The next card is the white master work card that is made up when the account comes into our office.

Q. When did the account come into your office?

A. September 9th, 1949.

Q. That is the same day you already testified to you saw Mrs. Lee, if I remember right?

A. That is correct.

Q. Did you make any notations on the back of that card as to what transpired when you saw Mrs. Lee? A. No.

Q. When did you—what does the next card mean?

A. The next card is a card supplied us by the Central Credit Reporting Bureau.

Q. When did you get that card?

A. That card is made up in our office giving the name of the debtor concerned, her address, our code number of our office [167] with the Bureau, the amount of the claim and the month that the claim was filed with our office.

Q. Then what do you do with that?

A. That card is then mailed to the Central Credit Reporting Bureau.

Q. How long after you received the account was that mailed to the Central Bureau, do you remember, or have you any record of it there?

(Testimony of James R. Norberg.)

A. I have no record of it there. It is the common practice and instructions to the employees is that they are to go out the same day as an account comes in.

Q. Do you know if that went out the same day?

A. No, I don't.

Q. Then what happens after the card is sent out?

A. As soon as this card is received at the Central Credit Reporting Bureau they take all information they have pertaining to the debtor concerned and type it on the card and send the card back to us.

Q. What does that card show?

A. You mean the information they supply us?

Q. Yes.

A. It shows Ludolf, Paul, President. It shows the corrected address of 827 Broadway, Redwood City. It also shows Brick O'Gold Corporation, a suit filed in Municipal Court on 8-2-49 for services and materials for \$1,401.00, Sullivan, Roche, [168] Johnson and Farraher, attorneys. Another suit filed in the Municipal Court on 8-8-49 for rent, \$1,200.00, Young, Hudson and Rabinowitz, the attorneys. Another suit filed on 8-26-49 for moneys, \$334.00, Colvin and Tyler, attorneys. It also shows another member of the Bureau as having a \$544.04 claim listed with them in July of 1949 and cancelled in August of '49.

Q. When did you receive that card from the Bureau? A. I don't know the exact date.

Q. Roughly, as far as you can remember?

A. These cards always come back to us within a

(Testimony of James R. Norberg.)

maximum of four days from the time that they are received at the Bureau.

Q. Then would you say—withdraw that. Did you get that card before or after the attachment was levied? A. After.

Q. Are you sure about that?

A. I am positive of that.

Q. About how long after the attachment was levied, would you know roughly?

A. I would say three days, four days.

Q. Three days after the attachment was levied?

A. Yes.

Q. What does the next card show?

A. The next card is a flasher that comes in from the Bureau showing for our reference to our files that we have the claim [169] against Brick O'Gold at 926 Broadway in Redwood City for \$1,029.00 listed in September 6th, 1949. They show another suit filed on September 20th of 1949 in the Municipal Court for services, \$352.00, R. L. Isaacs, attorney.

Q. September 20th? A. Yes.

Q. When did you get that flasher back, do you know roughly?

A. Well, approximately September 27th to 30th. Between seven and ten days after the action is filed because this information is obtained from the Edwards Abstract.

Q. Then what is the next attached card?

A. The next one has the same reference to our claim of \$1,029.00 showing a suit against Brick

(Testimony of James R. Norberg.)

O'Gold in Municipal Court on 10-11-49, unlawful detainer, Piccirillo and Wolf, attorneys.

Q. Now, at the time, then, Mr. Norberg—I will withdraw that. Now, you stated that you first saw Mrs. Lee on September 9th, that is the same day you received the account? A. That is correct.

Q. And you also testified that you went there and asked her for a check for over \$1,000.00, isn't that right? A. That is correct.

Q. How much was it exactly, do you remember?

A. \$1,029.00.

Q. And what did she tell you at that time? [170]

A. She told me to come back the next day, that the checks were in the plant in Redwood City. She didn't have that kind of cash, she would get a check for me if I would pick it up the next day.

Q. Anything else said as to the financial condition or inability to pay? A. Nothing.

Q. At that time? A. Nothing.

Q. Did she say anything at all about any other creditors at that time? A. Nothing.

Q. Anything about financial statements at that time? A. No.

Q. How long did you talk to her then, roughly?

A. I would say five or ten minutes.

Q. That is the time you were there with another man from your office you have testified to?

A. Yes.

Q. Then the next day you went back, is that correct? A. Yes.

Q. And who was there at that time?

(Testimony of James R. Norberg.)

A. Mr. Ludolf, Miss Lee and myself.

Q. And what date was that?

A. That was on September 10th. [171]

Q. September 10th. Now, what was the conversation at that time?

A. I told her that I dropped in to pick up the check. They told me they didn't have the money. I told them that wasn't my understanding, that I was to pick up a check that date. Mr. Loudolph said that he had an appointment either that afternoon or that evening, sometime over the week end with some other gentleman who was putting in approximately five or ten thousand dollars cash into the business, and that he would have a check for me by Monday. I told him that if I didn't have a check by Monday I was filing suit and attaching. I did not intend to come back or telephone, the check must be in my office by nine o'clock Monday morning.

Q. What did they tell you?

A. He told me the check would be there.

Q. Did he say anything at all about his then financial condition at that time and on that date?

A. Nothing.

Q. Did he say anything at all about any other creditors at that time and on that date?

A. No.

Q. Or about any other suits pending against him?

A. Excuse me, there was one thing that he did mention that I recall now. He couldn't understand why KJBS had turned this account over to me be-

(Testimony of James R. Norberg.)

cause of the fact that he had told KJBS that [172] the account would be taken care of, that they had nothing to worry about, and he couldn't see why for the amount of money they had spent with KJBS they should turn it over to a collection agency. I told him that was no affair of mine, I was merely acting as agent for KJBS to pick up the money.

Q. Now, did you tell him why you were going to attach?

A. I gave no reason for attaching, no. I just told him that if the money wasn't in I was going to attach.

Q. Did you have any reason to attach, Mr. Norberg, instead of waiting for the money?

A. Well, that is the customary practice. When we don't receive payment on an account we get a million promises that are not fulfilled and in order to get the money to expedite matters if we know where there are assets, well there is an attachment.

Q. Did he tell you where some of the assets were?

A. No, we found them on our own.

Q. When was the first time, the very first time that you ever heard about a financial statement from either Miss Lee or Mr. Loudolph or Mr. Kolb?

A. In Kolb's office.

Q. When was that, for the very first time, if you can remember? Let's put it this way. How long after the attachment? A. Around seven days.

Q. Around seven days? [173]

A. Maybe two days either way, maybe five days or nine days; around seven days.

(Testimony of James R. Norberg.)

Q. And what was the reason and can you give me the purpose or reason of why you happened to hear about a financial statement and talk to anyone about that financial statement?

A. I had been asked by Mr. Kolb to come down to the office, that Mr. Loudolph and Miss Lee were going to be there, and when I came down they told me that I had nothing to worry about.

Q. Who told you?

A. Mr. Loudolph and Miss Lee; we had nothing to worry about, that it was just a matter that they didn't have the amount of cash to pay the account off. They were able to prove this by a financial statement which Mr. Kolb had down there that was supplied to him, and they showed me the financial statement showing that everything was all right as far as their business was concerned.

Q. And that was about, you would say around seven, eight, nine days, somewhere around there, after the attachment?

A. After the attachment, that is correct.

Q. Did you question them about the financial statement at that time, that very first time you were there? A. No.

Q. Was anything discussed about the statement other than what you have just testified to as far as you can remember?

A. Well, I don't know when these questions came up and at what [174] meetings regarding certain items on the financial statement such as the moneys due by officers was one item. Now, whether that was

(Testimony of James R. Norberg.)

brought up at that meeting or at a subsequent meeting I am not sure, and also in regards to the amount of the accounts receivable.

Q. Now, will you tell me why you attended those meetings, Mr. Norberg, inasmuch as you had the money under attachment as you said in your suit?

A. Well, I went down there hoping that something could be worked out where I could get a check immediately without having to wait for the time to pass within which to take my judgment, Miss Lee having been served on the morning of the 12th I would have to wait until the 22nd to take my judgment and then get an execution, follow through the regular course of the courts and have the sheriff pick up the money which may take anywhere up to thirty days before I would get my money, and the possibility that I could get the money down there and then release my attachment.

Q. Did you have any reason to believe that you would or would not get your money at that time when you went there?

A. I didn't know if I would get it or not. It was just a shot in the dark when I went down there to hope that I would get it.

Q. Did you have any reason to believe that you would get it?

A. I had no reason to believe I wouldn't get it, no.

Q. When you first saw the financial statement, and when we say [175] "financial statement" for the record we refer to defendant's Exhibit D, Mr.

(Testimony of James R. Norberg.)

Loudolph did most of the talking, did he, with reference to this statement?

A. No, Mr. Loudolph didn't.

Q. Who did?

A. I believe it was Mr. Kolb and myself. Mr. Loudolph was merely answering questions to the best of his ability while we were there.

Q. Did you have any reason to disbelieve or to believe that statement?

A. At a later meeting I was—

Q. I mean at the very first meeting?

A. At the very first meeting?

Q. Yes. A. No.

Q. What?

A. I had no reason to believe it or disbelieve it, either one.

Q. Did he try to impress upon you—with withdraw that. Did he in any way emphasize his status, his financial status? By "he" I mean Mr. Loudolph, emphasize his financial status with reference to the statement at that very first meeting?

A. Yes, he said—

Q. What did he say?

A. He said the statement was correct because at that time he was negotiating with the bank and also at that time he was [176] negotiating with the bank for a loan and that this financial statement was being used and therefore it was correct.

Q. Did you believe him then?

A. Yes, I believed him.

Q. Did you ask him for any check when you

(Testimony of James R. Norberg.)

were there for your money, which was the reason of why you went there?

A. No, he told me that they still hadn't been able to raise the cash.

Q. I see. Did you ask him when he would?

A. Well, I don't know as I asked him because it was brought out that Mr. Loudolph was still negotiating with this party or other parties. In the meantime, he was trying to arrange with other parties to invest money in the corporation down there.

Q. And did he say anything at all as to when you would get the cash? A. No.

Mr. Berger: That is all.

#### Recross-Examination

By Mr. Margolis:

Q. Mr. Norberg, this agency from whom you get the information that is attached to plaintiff's Exhibit No. 6 was located here in San Francisco?

A. Yes.

Q. And from time to time is it not a fact that information is secured over the telephone? I mean, you could call up and they could give you the information almost at once by your [177] giving the operator what is known as your "call number"?

A. Yes, that is possible.

Q. And frequently when you have cases requiring collections of \$1,000.00 or more and you want to proceed with haste, you make your inquiry by telephone? A. No.

Q. You do not? A. No.

(Testimony of James R. Norberg.)

Q. It was possible for you to get such information by telephone?

A. It is possible, but we do not usually practice it.

Q. Now, I think you told us that the last item attached to this Exhibit 6 showed information of receipt for services—suit for services commenced on September 20th, 1949, for \$352.00, and you also told us that you believed you got that information not later than September 27th or 30th?

A. That is correct.

Q. Now, between September 27th and September 30th you already knew, did you not, of this suit for the \$352.00 for services against the Brick O'Gold Corporation?

A. May I answer that in this way, Mr. Margolis?

Q. Will you answer the question first and make any explanation you wish? I am not going to hamper you in that respect. I will withdraw my question and ask it again. You told us that appended to that plaintiff's Exhibit No. 6 was a [178] paper with information that a suit was commenced against the Brick O'Gold Corporation for \$352.00 for services, and the suit was commenced according to my notes on September 20, 1949, and that in the ordinary course of business inquiry as made by you of that agency who would get you that information between September 27th and September 30th, you so testified a moment ago, is that correct?

A. Yes.

Q. And between September 27th and September

(Testimony of James R. Norberg.)

30th you did receive the information with respect to this suit, is that correct?

A. That is a presumption.

Q. A presumption? A. Yes.

Q. At that time did you already have the information which is attached to that exhibit that a suit on 8-2-49 for services had already been commenced?

A. Yes.

Q. Against the bankrupt corporation?

A. Yes.

Q. And you also had the information that on August 8th, 1949, a suit had been commenced for rent against the bankrupt corporation, is that a fact? A. Yes.

Q. And you also had the information that on 8-26-49 a suit [179] had been brought for the sum of \$334.00 against the corporation?

Mr. Berger: Just one moment, if I may. If your Honor please, I don't know what point of time counsel is referring to. I must assume for the sake of the questions that that was between September 27th and 30th. Is that what he is driving at? I can't quite follow the question.

The Court: Well, he asked the witness whether he had that information prior to September 27th.

Mr. Berger: That is what I wanted to know, if he had the information prior to September; if so, when?

Mr. Margolis: That is right.

The Court: You may pursue that a little further.

(Testimony of James R. Norberg.)

Q. (By Mr. Margolis): Well, suppose I go back and clarify it, your Honor.

The Court: You may ask him when he got that information.

Q. (By Mr. Margolis): Can you tell us when you got the information with respect to the suit which was commenced according to what you yourself read from plaintiff's Exhibit 6 on 8-2-49? I say 8-2-49 because that is the date on which he gave it to you.

A. This information would be about the 20th—wait a minute, excuse me, it would be approximately the 15th of September or the 16th of September, something like that.

Q. Now, in what amount was that, Mr. [180] Norberg? In what amount does the document state there the amount of that suit?

A. Well, there are all three suits on this?

Q. Well, I am asking you about the one of 8-2-49? A. \$1,401.00.

Q. Now, the suit for rent commenced 8-8-49 as you gave it to us? A. Yes.

Q. The information was received by you when?

A. This information was all received on one card.

Q. Then it would be between September 15th and 16th?

A. Yes, possibly September 15th or 16th.

Q. Was there an amount?

A. Yes, \$1,200.00.

Q. \$1,200.00? A. Yes.

Q. Was that an unlawful detainer action, you

(Testimony of James R. Norberg.)  
sought recovery of the premises?

A. No, just rent. It may have been an unlawful detainer action; however, the abbreviation she puts in here is rent.

Q. The one on 8-26-49 was for what?

A. \$334.00.

Q. What was the nature of the action?

A. Money.

Q. Now then, if I understand you, that these three items which [181] we have just read off, you got the information between September 15th and 16th, and that thereafter between September 27th and September 30th you were apprised of an additional suit commenced on September 20th for services in the sum of \$352.00, is that correct?

A. Do you mean I as an individual was apprised of it?

Q. Your office.

A. Well, that is what I tried to explain to you awhile ago, Mr. Margolis, if I can make the explanation now. I don't see all of these things as they come in. That has been one big bone of contention in my office, that we pay for this information and do not use it. Now, it sounds rather silly I will admit, but, however, these things come in and I may not see them for a month, and some of them I never see. They may be attached to the card, I may have seen it, I don't know, so I am not going to answer the question yes or no because I do not know.

Q. The card reveals, however, that a writ of

(Testimony of James R. Norberg.)

execution was levied on October 5th, 1949, does it not? A. No.

Q. Does your file reveal this?

A. An execution on October 5th.

Q. I get my information from a letter received from Mr. McGrath, the sheriff of San Mateo County, in answer to an inquiry made for the [182] particulars.

A. Well, there is no entry on my card from September 22nd until October 7th.

Q. Well, your attorney stipulated that the facts in that portion of the paragraph were true and correct, that an execution was levied on October 5th, 1949, is there any question about it?

A. Is that the date that the execution is dated?

Mr. Berger: If your Honor please, I have an execution dated October 5th, but it doesn't show the date of levy.

Mr. Margolis: May I read this to you, and you can correct it: "October 5, 1949. J. R. Norberg, et al., vs. Brick O'Gold, Inc., San Francisco Municipal Court, 258127, Execution in which five garnishments were made as follows, and then the sheriff—

The Witness: May I see it?

Mr. Margolis: Yes, you certainly may, and if you want to see a copy of my letter of inquiry I would be glad to show you that.

The Witness: Well, I don't know anything about this letter.

Mr. Berger: Let me see it, Max.

(Testimony of James R. Norberg.)

Mr. Margolis: Well, perhaps I can approach it, your Honor, this way. I will not labor that point. There is an allegation that an attachment was made on the 12th or 13th of September and execution levied on the 5th. Now, if there is a [183] day or two difference in it I do not think it is material. The purpose of the recross-examination is to demonstrate to the Court what the defendant knew or had reason to know on the date the execution was levied, he having demonstrated by his own records and information what he knew.

Mr. Berger: Just a moment. I will object to a statement to that effect because that is not the fact. The facts are as to what he knew or had reason to know September 12th, the date of the attachment, not October. September 12th is the governing date, your Honor.

Mr. Margolis: It is more than four months had elapsed between the attachment and the filing of the petition, your Honor. I think we wouldn't be here, I would concede in this Court or in any Court that if the line of the attachment had ripened into a valid lien which we couldn't attack in a proceeding of this kind. But in view of the fact that the attachment and the execution both are within a four month period, it is my contention that the knowledge even before the execution is very, very important, and I have a case on the situation, if your Honor desires I will submit it later.

The Court: You know, I think that knowledge—

(Testimony of James R. Norberg.)

Mr. Berger: Must be, your Honor, on September 12th.

The Court: I realize that that is technically correct, but a knowledge that he had afterwards may reflect his state of mind earlier. [184]

Mr. Berger: They will have to prove the state of mind was his state of mind on September 12th.

The Court: That is true, but knowledge that he acquired afterwards may reflect somewhat on that.

Mr. Margolis: Taking all the circumstances together, your Honor.

The Court: Just as I have heard a lot of testimony relative to his conferences along late in September and October, et cetera. I think they are pertinent as showing his state of mind.

Mr. Berger: That is true, except the only conference he had prior to the attachment was on the 9th of September because the attachment went on two days later. Those are the important points, but as I said, we are not arguing the case yet, your Honor.

The Court: Further cross-examination.

Mr. Margolis: I want to look at this card one moment, your Honor, and I may be through or I may have another question. I have no further questions, your Honor.

Mr. Berger: No further questions, your Honor.

The Court: You may go down. Any further testimony?

Mr. Margolis: I would like to introduce a short rebuttal testimony, your Honor, by one witness.

(Testimony of James R. Norberg.)

The Court: You have a right to that.

Mr. Margolis: I will call Miss Lee, your [185] Honor.

### MISS LEE

previously sworn, resumed the stand and testified as follows:

#### Redirect Examination

By Mr. Margolis:

Q. Miss Lee, you sat in the Courtroom and heard Mr. Norberg both yesterday and this morning tell the Court that when he appeared at the premises out there at Lakeside in connection with this claim you told him to come back the next morning and you would have a check for him in full. You heard that testimony? A. Yes.

Q. Did you tell him anything of that kind?

A. No, I did not tell him anything of the kind. May I explain it, your Honor?

The Court: You may explain.

The Witness: Because we did not have that money and it would be impossible to get that money overnight, and in fact I told Mr. Norberg that we were in such critical condition that we even owed wages, that if we had the money we would certainly take care of our wages instead of being in the situation we were in.

Q. You told him that when he called on the 9th of September?

A. The first day when he came in he did ask

(Testimony of Nellie Lee.)

quite a number of questions about the condition of the company because when he [186] asked us for the check and I said we could not pay him, we really did not have the funds, and I explained to him the situation of the company.

Q. Did you participate—I will withdraw that. You heard Mr. Norberg testify that the next day when he returned that both you and Mr. Loudolph told him that there was nothing to worry about. Did you participate in that conference the next day or were you engaged elsewhere about the premises?

A. On the first day Mr. Norberg and I spoke at length, and it was concerning—he asked about the assets of the company and also about the accounts receivable and what they amounted to and which of the stores had accumulated the accounts receivable. On the second day I did not participate in the conversation.

Mr. Margolis: That is all.

Mr. Berger: Just a moment, please.

#### Recross-Examination

By Mr. Berger:

Q. You had never seen Mr. Norberg at any time prior to that September 9th when he came into your store, isn't that correct?

A. As far as my memory is, I do not believe I had ever seen him. That was the first time.

Q. First time you ever met him was when he came into your store September 9th?

A. Yes. [187]

(Testimony of Nellie Lee.)

Q. And he came in alone or with someone else, do you remember?

A. I only talked with Mr. Norberg. If he came with someone I do not remember. He may have been in with someone.

Q. Now, please try to confine yourself to answering my questions. I don't want a speech. Now, at the time when he first came in on September 9th he came in and presented a bill or some statement to you asking you for some money, did he not?

A. Yes, sir, that is right.

Q. He asked you for how much money?

A. Yes, he gave the amount.

Q. He gave the amount over \$1,000.00, is that correct? A. Yes.

Q. And then you knew nothing about him, you didn't know the other man at all that was with him, did you? A. No.

Mr. Margolis: Just a moment, may it please your Honor, the witness didn't testify that she knew there was someone else with him.

The Court: She says there may or may not have been, and she says she didn't know him if he was there.

Q. (By Mr. Berger): Now, do you mean to tell me and to tell the Court that out of a clear sky you told Mr. Norberg all about your financial condition and financial position when you didn't know anything about him?

Mr. Margolis: Just a moment. I submit, may it please your [188] Honor, that question is objection-

(Testimony of Nellie Lee.)

able on the ground that it is argumentative, "does she mean." I think counsel should ask—

The Court: You may reframe it.

Q. (By Mr. Berger): Miss Lee, am I given to understand that when you knew nothing about Mr. Norberg, didn't know who the man was, that you told him all about your financial condition of the corporation as to how much money you owed and all about that before you knew anything about him?

Mr. Margolis: Just a moment, Miss Lee. May it please your Honor, I would like to enter an objection here on the ground that it is incompetent, immaterial and on the further ground that it tends to mislead the witness. The witness testified that he presented a statement.

The Court: No, I will allow the statement. I think the witness can take care of herself. I don't think they are going to mislead her.

The Witness: May I explain to you?

The Court: Answer it, and then explain at some length.

A. You asked me why I would answer a stranger all those questions.

Q. No, I asked you whether or not you would tell a stranger all that information.

A. I had been answering all those very difficult questions many, many times.

Q. I am asking you whether or not this same stranger asked [189] you those questions before—you never saw him before?

A. He had never asked me before.

(Testimony of Nellie Lee.)

Q. Exactly. Then he came in the very first time on September 9th? A. Yes.

Q. And then you told him all about your financial condition of the corporation?

A. He introduced himself as a collecting agent and I am familiar that we do owe that money and he asked me, I was in a position and had to explain to him.

Q. You were in a position to know all about your financial condition, weren't you?

A. How the situation was with us, yes, sir.

Q. Even though you knew your financial condition by virtue of your financial statement, defendant's Exhibit D, you knew all about that, too, at that time?

A. The statement was not with me at that time.

Q. But you knew the contents of it, did you not?

A. Yes.

Q. How long did he talk to you at that time, the very first time?

A. I would say at least fifteen minutes.

Q. Fifteen minutes. And did you or did you not tell him to come back the next day, that you would have a check for him?

A. He requested an appointment. [190]

Q. I asked you a question, whether you did or did not tell him that you would have a check for him the next day?

A. I did not tell him that.

Q. Did you tell him that you would try to get a check for him the next day?

(Testimony of Nellie Lee.)

A. I did not tell him that.

Q. Did you tell him anything at all about your getting a check from the home office or the other plant?

A. I did not tell him that. We did not have that money.

Q. Did you say anything at all about getting a check? A. No, I did not.

Q. Did you tell him the money would or would not be paid?

A. I told him I would like to have the bill paid, we were working on additional capital, that was the only way to work out the problem.

Mr. Berger: Okay, that is all.

Mr. Margolis: We have no further questions. I would like to put Mr. Ludolf on for a few minutes.

The Court: All right. Is it something new or is it just repeat?

Mr. Margolis: Just rebuttal, your Honor, nothing new.

Mr. Berger: I don't know, your Honor; I was going to call Mr. Kolb back, but I think it would be nothing more than what has gone before.

The Court: Somebody has to have the last word. If there [191] is something that hasn't been brought out, all right, but if he is just going to deny the testimony of the defendant's witnesses, then do you want to go on and deny his testimony?

Mr. Margolis: I am always satisfied with the next to the last word.

The Court: We will have a denial and a re-denial but if there is anything new——

Mr. Margolis: I state to your Honor very frankly I am satisfied with next to the last word. There is nothing new, I am frank to state that. Just about these conversations.

The Court: I have a fair memory, I think I will remember what the testimony is.

Mr. Berger: I have no further witnesses, your Honor.

The Court: Then I will consider the case. Mr. Berger, I think I will hear from you.

Mr. Berger: Thank you, your Honor. First of all, if your Honor desires, I would be more than pleased to submit to your Honor a list of authorities, some of which I read the other day, but which will be touched upon in my very brief argument. I am going to try to make it very brief, and to give the authorities to support my contentions and to show the lack of proof that is required and necessary on the part of the plaintiff to prove two of the main important things as to the knowledge at the time of the attachment and the fact of insolvency at the time of the attachment, and naturally, the knowledge of [192] that at the time of the attachment, so with that in mind, if your Honor would desire, I would be more than pleased——

The Court: Well, I want the two issues here which are, first, was the corporation insolvent at the time of September 12th?

Mr. Berger: Let's take some of the exhibits.

The Court: Second, did the attachment know or have reason to know of that condition?

Mr. Berger: Of course, the burden to prove all of that is on the plaintiff. They must prove those two points, and if they can't prove them by a preponderance of the evidence they have no case. Now, let's take these things step by step if we possibly can. The fact that the corporation may be insolvent or may be in a financial condition at some later date hasn't anything to do with the issue. It must be on that date. Now, let's see, July 2nd, or rather May 31st, is the very first letter in evidence, Defendant's Exhibit A from the Brick O'Gold Corporation which was prior to the attachment, and all that states is that their inability to meet the bill to the Pacific Electrical Mechanical Company. In May. That doesn't show that they are in any way insolvent, just that they cannot meet their bill. Now, that in and of itself is not proof of insolvency. We then go to the July 2nd letter from the Brick O'Gold Corporation explaining what their capital asset is, they say approximately \$50,000.00, and it is intact, and they [193] desire that this corporation, this Pacific Mechanical Electrical Company, does not file the suit. Then a few days later their statement, financial statement, Defendant's Exhibit D, shows their true financial picture so testified to by both Miss Lee and Mr. Ludolf that they wanted everyone to rely upon it, they submitted it to the bank, or this RFC corporation that it was true and correct and that it should be believed, July 13, 1949. Now, where is any evidence in between any of those

dates, up to the date of September 12, 1949, to change the picture? In fact, Mr. Ludolf himself testified, rather not less than I think a half dozen times on direct, cross, and even upon question by your Honor, that the picture had not changed up as late as November, I think he said, from July when a statement was first made up. That they were exactly the same as far as their financial condition was concerned. Now, it isn't enough, if the Court please, to charge the defendant with knowledge of the insolvency or even their reasonable belief to know of the insolvency, if the Court please, or financially embarrassed, you might say, that is not enough information and not enough to charge them. I have authority on that. Even that the defendant may have cause to suspect the insolvency or the financial inability to pay, that is not enough. Mere suspicion on the part that they cannot pay is not enough and unwillingness to trust them any further is not enough and the unwillingness to trust further was by [194] Mr. Kolb but only—not because of their financial condition, but because of the financial inability to pin Mr. Ludolf down as he said. He would make appointments and wouldn't keep them. He would tell him he would have certain information about the financial statement and he wouldn't produce it. In other words, they didn't want to rely upon his word. But that has nothing to do with the assets or the financial ability of the corporation.

The Court: And yet you are suggesting that they had perfect faith in this financial statement?

Mr. Berger: I am not interested in what Mr. Kolb had faith in. I am interested only in what Mr. Norberg had at the time of the levy. Mr. Kolb, if your Honor please, entered the picture a long time afterwards, after September 12th. Number two, Mr. Norberg really had to go down to those meetings. He talked to them before hand, he talked to Miss Lee before and Mr. Ludolf before. They told him they would have a check. Of course, it is up to your Honor as to who to believe. It is up to your Honor to ascertain as to whether or not the preponderance of the evidence has been brought out and sustained by the plaintiff in telling that on September 12th or prior thereto Mr. Norberg, the defendant, had reasonable knowledge to believe the insolvency or that that corporation was insolvent. There has been no proof of that yet on that date. Now, the obtaining of additional security or the anxiety by a claimant [195] is not sufficient grounds. I have the authority for that, and receiving payment of the debt is not sufficient grounds. Now, just because a corporation wanted more money as they said, which was to tide them over, they had enough cash, they admitted they had enough cash, the only reason being that they couldn't use the cash was because as they said they had a suit and they called it a "phoney suit" tying up the money, which suit was brought by this accountant, I think he said, but the cash was there and was available. If they wanted to use the cash they could have certainly bonded, but they probably didn't desire or need or think that was necessary. They were

still in a financially sound condition according to their own statement on that date, and Mr. Norberg knew nothing about these other matters until long after the attachment. As I said, he didn't even have to go down there to find that out, but they asked him to go down there, the attorneys asked him to go down to check into it, and, as he said, the reason of going down, which is common, which is ordinary and which is proper, and I think, good business, was to get the check sooner. If he could have gotten it, why fine and dandy. Also, that if the creditor received the money in good faith as he did when he attached that and the receipt of the money in all the matters with reference to the execution dates, back to the date of the attachment, and that certainly was in good faith, there is no showing of any intentional preference or even [196] knowledge that there would be an intentional preference, and even then as set forth in the 23 Cal. 2nd 444, that wouldn't be a preference, or wouldn't have knowledge or wouldn't show a knowledge of an insolvency of getting the money at that time. He wanted his money as quickly as he could. The creditor is not charged with a knowledge that the corporation is insolvent merely because he cannot pay the bill at that time, if they are financially embarrassed or have that financial inability to pay. Or even the knowledge that the debtor has experienced difficulty in meeting his obligations also is not sufficient to charge with knowledge. True, as he said, they needed working capital. Well, that is a common occurrence of every corporation. It is

common practice, a lot of corporations need working capital and just because a corporation needs working capital and doesn't have it, it certainly would be a sorry picture that if every corporation that needed working capital was insolvent. We wouldn't have half the corporations. Probably your Honor will remember, perhaps in your own practice, in your corporation work, a lot of the corporations needed capital. I know I have in my work. A lot of the corporations I have represented needed a lot of capital, but by a long stretch of the imagination they were not insolvent. They manage to somehow get out of the difficulty, but just because they do need that financial stimulus, you might say, doesn't mean they are insolvent in the true sense of the word, especially [197] in view of Defendant's Exhibit D. Their own admissions, and, as I said, they could have avoided that financial inability to pay by putting up a bond in connection with that suit because that was the only reason they said he didn't have the money, because of that so-called "phoney suit." Now, with reference to Mr. Ludolf's credibility, your Honor will remember, I think your Honor asked him and I know I asked him several times about suits. Between August and November he knew nothing about any suits. He received no summons, he didn't know about any judgment or anything like that. He didn't know when he was served or if any member was served and Mrs. Lee corrected him when she said in September she got the summons, she got the summons in August, I think, on that other suit. She immediately told that

to Mr. Ludolf the very next day, that she received the summons, but he didn't remember that, or at least he wanted the Court to believe that he didn't know anything about it. The purpose of that statement I don't know or the purpose of that answer, why he answered that way I don't know, but at least it shows his credibility and with reference to that, it is rather odd, I feel, that Mr. Ludolf went along with the story in a sort of a chronological way, knew all about preference, knew all about everything before even some questions were asked him. As to the effect of that statement in that manner, why naturally I will have to leave it up to your Honor. Now, as far as Kolb's being unwilling [198] to trust further, as I said, that really is no part of the issue as far as we are concerned. We are not charged with any knowledge that Kolb may have had, only insofar as we went there, as Norberg said, to get the check in advance, that is in advance, I mean, in advance of that ten days or whatever days time for the obtaining of the default judgment, and they also said that they had no defense, money was due the corporation—due the radio station, and if that is the case why it wasn't a question of waiting, just a question of getting the money. Mr. Kolb didn't question the financial statement, he just questioned it—he wanted a breakdown on it, and he didn't say he didn't rely on it. He didn't rely on Mr. Ludolf. He didn't like the way he did the business that he managed and operated. He wanted Miss Lee to operate the business. Now, if he questioned the corporation's financial

status, if he questioned this statement, then obviously he wouldn't insist, or that is, his clients, rather, wouldn't insist that Mrs. Lee operate the business. If they felt that the business was of no value it wouldn't make any difference to them who would operate the business. They felt the business was a good thing. They felt the business could make money. They felt, probably, that the business didn't have the financial status according to the statement, but they didn't like the way Mr. Ludolf was conducting himself and that is why they didn't want to believe him. I think Mr. Kolb testified to that fact two [199] or three times. Does that show reason to believe that the corporation is financially unsound, insolvent? That wouldn't in and of itself show that point.

The Court: Mr. Berger, let's be frank about this thing and realize we are dealing with realistic business people. You, knowing your experience as I have in mind, know that a business man who is being pressed will always turn up with a financial statement and a hard-boiled collection agency or collection attorney doesn't pay very much attention to it. I have had that experience and so have you. If I could have gotten my clients away from pressure by showing financial statements, I never would have had any worries.

Mr. Berger: But—I am sorry, are you through?

The Court: No, go right ahead.

Mr. Berger: Your Honor, that is all very true. It is a common practice, but let's look at this financial statement. Before any pressure of any

kind was put on them, July 31st, before Mr. Kolb went after them, which was in August, before Mr. Norberg went after them, which was in September—this is in July. There is no proof of any kind as far as I remember, now I may be wrong in that, I may have forgotten some of the points, but there is no proof as far as I can remember that they were financially embarrassed in July other than the fact that they needed working capital as they said.

The Court: Other than the fact they needed working capital [200] and couldn't pay their bills, they went out and bought an umbrella before they read the weather forecast.

Mr. Berger: At the same time he said he had the accounts receivable from these stores, but he didn't want to press them. As far as he was concerned, the money was held in trust because the money was in possession of these various franchise stores and they had that money belonging to him. Had he pressed them, he could have gotten it, but he didn't want to press them. Therefore, his money, which he was entitled to, was spread out. A little too thin, perhaps, for his own financial good, but still it was there. It was spread out a little thin. He had to thicken, you might say, this spread and that is what he was trying to do. That, in and of itself, doesn't show insolvency, your Honor. That happens every day where corporations extend themselves either with the purchase of merchandise or the purchase of inventory, real estate, whatever it may be. They must have more working capital for

the present, everyday bills. And the fact that a creditor, long after the status is established of July 31st, comes in and says, "I want my money. Here you say you are in a position to pay, you have got the cash, why stall me any more?" and they give him some excuse or another, well, he doesn't have to wait. The fact of the matter is he can go in and attach, but he didn't. He gave them a chance and there is no reason to disbelieve Mr. Norberg to the effect that he waited between [201] September 10th and September 12th when he attached. He could have attached September 9th, but he went down to save the cost and said, "I want that check." They said, "Come back tomorrow," otherwise he wouldn't have had to come back tomorrow if they gave him a song and dance. He could have attached that same day, he could have left that store and gone down that same day and levied them with an attachment, but he didn't do it. He said he would come back September 10th. They said, "Come back in a few days. We will have the check." He still didn't attach and he could have had he just said, "Well, we just don't have the money. We are broke." Then, he came back on September 12th. Then they said, "Well, we will have to get more working capital." Well, then he knew that is a general practice, that they are giving him the runaround and as testified to by Mr. Kolb, the tactics employed by Mr. Ludolf, his inability to keep promises, his inability to conform to what he said, his inability to keep appointments, was very disappointing to him, also, and to his client and also to

Mr. Norberg. That doesn't show they are insolvent at that time. Now, with reference to Miss Lee, as I said, she more or less disapproved Mr. Ludolf's statement and really attacked his credibility as to that one point with reference to his having no knowledge of any prior suits, and also rather odd, leaving it up to your Honor to draw whatever inference your Honor desires, that when no question was asked, I brought that out to your [202] Honor I think, right after she testified, no direct question was asked her right after she was on the witness stand, she starts in giving her story all about what she told Mr. Norberg, all about the previous accounts, the previous indebtedness, all about the financial inability; well, first of all I don't know how she knew what questions were going to be asked her before the question was asked her. I don't know why she could give a statement that would be bearing on the very issue, she is no lawyer, bearing on the very issue of what was going to be developed, and then when it came to the point as to her knowledge of the statement, her knowledge of everything, oh, yes; she knew all about it, she knew all about the statement, she knew all about the assets. Then it is rather hard to believe that a woman of, I presume, very good ability as far as business was concerned, probably very good education, I don't know, it is none of my affair, but still it is hard to believe a woman in business would tell a stranger coming in asking for a bill all about their financial status. I think they would be ashamed to say that, or if she

would say that, that is the very first thing the stranger would do, would be to throw them into bankruptcy if they were that precarious, and as she said, she didn't want anyone to know of it, that would be exactly the opposite of what she would tell by her own admissions. She wouldn't start in telling a stranger all about their financial condition in insolvency, as [203] it were, their inability to pay. It stands to reason that that is farfetched, very farfetched, to your Honor and I know to me. If she did say all of that, then her other statement, that she was afraid of bankruptcy, falls by the wayside, because they are both contradictory to each other. Now, where in all this evidence, defendant's exhibits and plaintiff's exhibits, is there any proof as far as the defendant is concerned, that on September 12th or prior to September 12th the corporation was insolvent and that the defendant knew about it or had any reasonable knowledge to believe that, not just mere suspicions, as I said before, not all of those other matters that may give any inference that there may be an insolvency. There must be more than that. There must be the actual proof of something tangible, something that the Court can, you might say, sink its teeth into, and so far there hasn't been anything like that here. Now, if your Honor please, I would like, with your Honor's permission, to submit this list of authorities. I have them here in rough draft. It wouldn't take me very long to write them out in very short brief form, that the corporation must be insolvent at the time and our point of time is

September 12th, that the creditor has reasonable cause to believe them solvent and it must be proved to have existed at the time of the levy before the preference may be avoided. There are cases on that. As I said, the mere inability to meet the current obligations is not an insolvency. [204]

The Court: I am familiar with the law of the case.

Mr. Berger: I am sure that your Honor is a more—has more experience than I have and I know that reading those, why roughly, your Honor will have these in mind, but I would like to, with your Honor's permission, just give you a short memorandum of those authorities.

The Court: Well, gentlemen, I don't think it is necessary for you to argue the case.

Mr. Margolis: If your Honor does not wish to hear from me, I wouldn't labor your Honor with any arguments.

The Court: Mr. Berger, I have listened to you with a great deal of interest. You are a man of intelligent, able, interesting and ingenious arguments, and I thank you for it. It has been a pleasure to listen to a good lawyer argue a case. Now, I unfortunately do not agree with the facts in the case as presented and suggested in your argument. I think the plaintiff has made out his case. The issues in this case are narrow, but there are only two points to be considered by the Court, all the formal matters as to bankruptcy, qualification of the trustee and the suit and the attachment, recovery of the money and other acts, the dates and

everything else are fixed. Now, two issues are to be decided and that is my duty. First, was the bankrupt corporation, Pot O'Gold, insolvent at the time, September 12, 1949; and secondly, did the defendant here know or have reason to know of such insolvency and [205] thereby obtain or attempt to obtain a preference. As to the first question, the testimony I think is quite clear that the condition of the corporation varied a little, if any, from August 12th to the time of the petition and also the adjudication in bankruptcy and that it was not only insolvent at the time of the bankruptcy, but it was insolvent on August 12th and perhaps long prior thereto. And although the representatives of the corporation furnished a financial statement and perhaps gave many arguments and verbal statements as to how good the corporation was and how good it was going to be, and though a little thick it was going to recover, I think that the picture is quite clear that the corporation was in a dying, if not dead, condition at the time that is involved here, namely August 12th. And going to the second question as to whether the defendant here knew or had reason to know of such condition, we must remember that we are not living in a theoretical world, but in a hard, realistic business world. We are dealing with a corporation that was endeavoring to survive, officers who had put what little money they had in it and naturally wanted to save it, and with creditors who wanted their money and were entitled to their money and were right to press for the collection of their money

with all their resources and all legal weapons available. Mr. Norberg in charge of a collection agency was given this account to collect, his job was to collect it and he was right when he took a look into that [206] corporation's affairs to press for his money. He didn't wait long, he did wait two days apparently, and I don't blame him at all for attaching. If I had been in his position I think I would have done it too because a collection agency's business is to get the money if they can and to get it as fast as they can and before the other people in like plight get to the scene of the kill. And so I think that there was ample reason for this able collection agency to know or have reason to know that the corporation was insolvent and it was necessary to get it quickly, and he did. Now, he was serving his clients, I trust, well and faithfully and if only four months had elapsed they would have gotten their money and everything would have been all right from their standpoint. Unfortunately for them, bankruptcy never being within the statutory period, and I am of the opinion that that created, that that action on his part created the preference. I find as matters of fact that the corporation, Pot O'Gold, was insolvent as of August 12, 1949, and that the defendants knew and had good grounds or good cause to know of that condition and that their action in pressing the legal claims, attaching and collecting, were in the nature of preferences and should be so decided. The plaintiff will present a form of decree in accordance with my views as expressed here.

Mr. Margolis: May I make one observation. Your Honor has referred, perhaps inadvertently, and Mr. Berger, by his [207] action was going to correct you, the Clerk called my attention to it as well, your Honor has referred three or four times to a date as August 12th. I think your Honor meant September 12th.

The Court: Inadvertently I said August 12th. September 12th is, of course, in the pleading and all testimony.

[Endorsed]: Filed November 27, 1950. [208]

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[Endorsed]: No. 12747. United States Court of Appeals for the Ninth Circuit. J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. North Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as co-partners under the firm name and style of KJBS Broadcasters, Appellants, vs. Paul W. Ryan, Trustee of the Estate of Brick O'Gold, a corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 27, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit  
No. 12747

HARRY F. MEILINK, Trustee of the Estate of  
BRICK O' GOLD, a Corporation,

Plaintiff,

vs.

J. R. NORBERG, an Individual Doing Business  
as NORBERG ADJUSTMENT BUREAU;  
HOPE D. PETTEY, WILLIAM B. DOLPH,  
ALICE HUSTON LEWIS, HELEN S.  
MARK, ELIZABETH BINGHAM, D.  
WORTH CLARK, EDWIN P. FRANKLIN,  
GLENNNA G. DOLPH, Individually and Doing  
Business as Co-partners Under the Firm  
Name and Style of KJBS BROADCASTERS,  
FIRST DOE, SECOND DOE, and THIRD  
DOE,

Defendants.

CONCISE STATEMENT OF POINTS

Pursuant to Rule 75-d of Rules of Civil Procedure, the appellants make the following concise statement of points upon which they intend to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Brick O'Gold, a corporation, was insolvent on the date of payment of the alleged preference.

## II.

The Order, Judgment and Decree of the Court was erroneous in that it fixed the valuation of the bankrupt's assets at the time of adjudication instead of the time of the alleged preference.

## III.

The Order, Judgment and Decree of the Court was erroneous in that the Court found that the Appellants had "reasonable cause to believe that the debtor was insolvent."

## IV.

The Order, Judgment and Decree of the Court was erroneous in awarding judgment to the Appellee in the sum of One Thousand Seventy-six Dollars and Forty Cents (\$1,076.40).

Respectfully submitted,

/s/ WILLIAM BERGER,

Attorney for Appellants.

[Endorsed]: Filed January 10, 1951.

[Title of Court of Appeals and Cause.]

APPELLEE'S STATEMENT AND DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL UNDER RULE 19

To the Above-Entitled Court and to Paul P. O'Brien, Esq., Clerk of Said Court and to William Berger, Esq., Attorney for the Above-named Appellants:

Appellee above named, in accordance with the provisions of Rule 19 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, designates the following as the additional portion of the record, proceedings and evidence to be contained in the Transcript of Record on appeal, notice of which said appeal has heretofore been filed by said appellants, as follows:

1. Complaint to Recover Preference, filed May 24, 1950;
2. Answer, filed June 9, 1950;
3. Findings of Fact and Conclusions of Law, filed August 9, 1950;
4. Judgment After Trial by Court, filed August 9, 1950;

Notice of Appeal, Clerk's Certificate;

5. All of the remaining portion of the reporter's transcript, pages 1 through 208, inclusive, not designated by appellants' Record on Appeal, filed on March 9, 1951, with the Clerk of the above-entitled Court;

6. This Appellee's Statement and Designation of additional portions of Record on Appeal Under Rule 19; and

7. Affidavit of Service by Mailing.

Respectfully submitted,

MAX H. MARGOLIS,  
JAMES M. CONNERS,

By /s/ MAX H. MARGOLIS,  
Attorneys for Appellee.

[Endorsed]: Filed March 16, 1951.

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[Title of Court of Appeals and Cause.]

STIPULATION FOR SUBSTITUTION  
OF APPELLEE

It appearing that Harry F. Meilink, Trustee of the estate of Brick O'Gold, a corporation, the above-named appellee, who was the duly appointed, qualified and acting Trustee of the estate of Brick O'Gold, a corporation, bankrupt, being No. 29769 of the files and records of the Clerk of the District Court of the United States for the Northern District of California, died on January 8, 1951; and it further appearing that after proceedings duly and regularly had before the Referee in Bankruptcy in said pending bankruptcy proceedings, one Paul W. Ryan on March 22, 1951, was duly and regularly appointed Trustee of the estate of said Brick O'Gold, a corporation, bankrupt, and thereafter qualified as such and is now the duly appointed,

qualified and acting Trustee of the estate of said  
Brick O'Gold, a corporation, bankrupt,

Now, Therefore, it is Hereby Stipulated by and  
between the attorneys for the above-named appellee  
and the attorney for the above-named appellants  
that Paul W. Ryan may be substituted in place of  
said Harry F. Meilink, deceased, as appellee in the  
above-entitled matter.

Dated: April 9, 1951.

MAX H. MARGOLIS,  
JAMES M. CONNERS,

By /s/ MAX H. MARGOLIS,  
Attorneys for Appellee.

/s/ WILLIAM BERGER,  
Attorney for Appellants.

[Endorsed]: Filed April 10, 1951.